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Workers in the field of corrections will find in this consultant's paper an examination of: (1) legal changes outside the area of the criminal process which have implications for corrections, (2) legal changes within the area of the criminal process, and (3) legal norms as a background for analyzing problems in the area of corrections. Intended as a ready reference, and as training material, the paper is elaborately documented. The five major sections concern: (1) the broad context of legal change in areas of governmental activity, (2) sentencing, (3) probation and parole, (4) imprisonment and the loss and restoration of civil rights, and (5) the juvenile correctional process. There is a pressing need for a model code of correctional procedure, and possible approaches to and some of the difficulties involved in the drafting of such a code are discussed. A summary of the document is available as VT 008 898. (JK)

A JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING CONSULTANT'S PAPER — MARCH 1969

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THE LEGAL CHALLENGE TO CORRECTIONS

The Joint Commission on Correctional Manpower and Training, incorporated in the District of Columbia, consists of nearly a hundred national, international, and regional organizations and public agencies which have joined together to attack one of the serious social problems of our day: How to secure enough trained men and women to bring about the rehabilitation of offenders through our correctional systems and thus prevent further delinquency and crime.

Recognizing the importance of this problem, the Congress in 1965 passed the Correctional Rehabilitation Study Act, which authorized grants through the Social and Rehabilitation Service for a broad study of correctional manpower and training. The Joint Commission is funded under this Act and through grants from private foundations, organizations, and individuals.

Commission publications available:

Differences That Make the Difference, papers of a seminar on implications of cultural differences for corrections. August 1967. 64 pp.

Targets for In-Service Training, papers of a seminar on in-service training. October 1967. 68 pp.

Research in Correctional Rehabilitation, report of a seminar on research in correctional rehabilitation. December 1967. 70 pp.

The Public Looks at Crime and Corrections, report of a public opinion survey. February 1968. 28 pp.

The Future of the Juvenile Court: Implications for Correctional Manpower and Training, consultants' paper. June 1968. 67 pp.

Offenders as a Correctional Manpower Resource, papers of a seminar on the use of offenders in corrections. July 1968. 103 pp.

Criminology and Corrections Programs: A Study of the Issues, report of a seminar. July 1968. 101 pp.

Corrections 1968: A Climate for Change, report of an attitude survey. August 1968. 45 pp.

The University and Corrections: Potential for Collaborative Relationships, consultant's paper. January 1969. 78 pp.

Volunteers Look at Corrections, report of an attitude survey. February 1969. 30 pp.

The Legal Challenge to Corrections: Implications for Manpower and Training, consultant's paper. March 1969. 107 pp.

THE LEGAL CHALLENGE TO CORRECTIONS:

IMPLICATIONS FOR MANPOWER AND TRAINING

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A consultant's paper prepared for the

Joint Commission on Correctional Manpower and Training

1522 K Street N.W.   Washington, D. C. 20005
March 1969

FOREWORD

It will come as a shock to many if not most probation officers, prison keepers, and parole officials that they are not endowed by law and the accouterments of their office with unfettered power to make decisions concerning their charges. It was to make this fact of life abundantly clear and stake out the boundaries of the legal prerogatives of their clientele that the Commission requested Professor Fred Cohen of the University of Texas Law School to prepare a paper he has called "The Legal Challenge to Corrections."

That is a good title, for the document develops in a logical and scholarly way how the courts are insisting that representation by counsel, due process, access to the courts, and fundamental fairness doctrines apply to prisoners, probationers, and parolees substantially as they do to free men. That constitutes a challenge to many time-honored practices of correctional workers, which can be met only through developing a staff sufficient in number and imaginative enough in approach to deal objectively and patiently with their day-to-day tasks.

The paper, couched in legal terms and elaborately documented, will not prove easy reading. But if the reader becomes sufficiently acquainted with its scope, it will provide a ready reference that can prevent unsound practices and perhaps save embarrassing court appearances. It will help a probation officer decide whether he can legally impose a condition that the probationer shall not engage in a protest movement and then send him to prison if he pickets a political rally. A prison warden can save his time and improve his image if he looks at the discussion on preparation of habeas corpus writs and foregoes his urge to throw a prisoner in "the hole" for helping a cellmate prepare a motion for a new trial. Professor Cohen's expertise and the value of his judgments are illustrated by his prediction that the U. S. Supreme Court would uphold the right of a prisoner to utilize the legal services of one of his fellows. As the paper went to press, the Court overruled a decision by a federal court of appeals — Johnson v. Avery — holding that a warden could forbid and punish such collaboration.

At the start, Professor Cohen touches on the sentencing process and its impact on the prisoner's future adjustment. He discusses whether the benevolent purpose doctrine underlying a grant of probation can be relied upon as an excuse for invading the privacy of a probationer and the extraction and subsequent use of information that is incriminatory. He then explores the muddy waters on which parole revocation hearings remain afloat. That these as now conducted may soon founder is foreshadowed by the cases discussed. There is also a most useful analysis of how far a warden can go in ordering a prisoner to clip his long hair, censor his mail, deny him an attorney, or use tear gas or long periods in solitary confinement on bread and water as disciplinary measures. A final chapter, prepared by Professor Robert Dawson of the University of Texas Law School, plunges manfully into the juvenile court controversy and the extent to which the protections guaranteed by the due process and the fundamental fairness doctrines apply to juveniles.

The Commission believes this consultant's paper like others it has published will be useful as training material. So it is with pleasure and a desire to be of service to the many people who have cooperated in the work of the Commission that this paper is presented. It does not vouch for all the material in the document or endorse all of its implications, but does offer it as a valuable tool for workers in the field of corrections. The paper provides proof also that there is a pressing need for a Model Code of Correctional Procedure and gives insight into the difficulties involved in the drafting of a compendium of this type.

Credit for this important contribution goes not only to Professor Cohen and his collaborators at the University of Texas but also to many members of the Commission's Washington staff including particularly Edward T. Magoffin and Jo Wallach.

JAMES V. BENNETT
President
Joint Commission on Correctional
Manpower and Training

AUTHOR'S PREFACE

As more is learned about how our correctional systems operate, it becomes increasingly clear that we cannot long tolerate the absence of the rule of law in an area where government officials daily regulate the lives of hundreds of thousands of individuals. Although the need for change seems urgent, surprisingly little has been written about the law and corrections and surprisingly little is known about the area by correctional officials and lawyers.

This work was prepared with several objectives in view: to examine in some detail legal changes that are occurring outside the area of the criminal process but which have implications for corrections; to explore legal changes within the criminal process; and to examine legal norms in the abstract as an introduction to a more specific analysis of problems in the areas of sentencing, probation and parole, prisoners' rights, and loss and restoration of civil rights.

This publication is somewhat heavily documented in order to permit it to be used as a resource document. The disproportionately long introduction was designed to point up the interrelatedness of correctional decision-making not only with the rest of the criminal process but also with areas of legal concern that at first blush seem to have no relevance for corrections.

The primary audience addressed is the field of corrections, although the material beginning with sentencing may prove to be of interest to lawyers. In being written by a lawyer the work faces the dilemma of being over-technical for non-lawyers and over-simplified for lawyers. The reader must judge whether a satisfactory balance has been achieved.

While the ultimate responsibility for this work is mine, I must gratefully acknowledge the assistance of a number of individuals. Edward T. Magoffin, Jr., Director of Legal Studies for the Joint Commission, must be regarded as the chief architect. He has constructively criticized some of my ideas, and successfully argued for some of his; he has, in brief, extruded the work from a sometimes reluctant and generally harassed law professor who is grateful for his invaluable help. My colleague, Professor Robert Dawson, has supplied a chapter on the juvenile correctional process. Lee Ruck and Robert Clark, both of the District of Columbia bar, performed valuable research services. Alex Bell, a student at the University of Texas Law School and articles editor of the *Texas Law Review,* was most helpful with editing and checking the citations to legal authority.

Finally, I must acknowledge the inevitable overlap of this work with two earlier publications. In 1966 I prepared a working paper entitled "Legal Norms in Corrections" for the President's Commission on Law Enforcement and Administration of Justice. That paper served as the basis for Chapter 8 of the Commission's task force report on corrections. In addition, I recently published an article entitled "Sentencing, Probation and the Rehabilitative Ideal," 47 *Texas Law Review* 1 (1968). The paper prepared for the President's Commission has not been widely distributed and no longer is available. Although there is some repetition and similarity in format, there are material differences and a substantial updating of the material; this is in no sense a "revised edition." The *Law Review* article deals with a more narrow subject matter and was written primarily for lawyers. I have, however, borrowed from it whenever it seemed expedient.

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I. THE CONTEXT OF CHANGE

Until quite recently those who administer our correctional systems could confidently pursue their varied goals by virtually any technique deemed satisfactory to them. True, there existed internal scrutiny and review; legislative committees or citizen groups might ask occasional questions, but the courts rarely interfered and legislative guidelines on basic policy and decision-making criteria either were nonexistent or so vague as to be nonexistent.

This situation has not changed drastically, but there are today some clear signs that the correctional process [1] — the imposition, execution, and relief from criminal sanctions — no longer will remain outside the domain of the rule of law. That this is neither idle threat nor wishful thinking is documented by such factors as the increase in the volume and the variety of challenges to correctional decision-making in the courts,[2] the findings and recommendations of the President's Commission on Law Enforcement and Administration of Justice, the work of the American Bar Association's Project on Minimum Standards for Criminal Justice, the increasing concern about correctional decision-making in legal education and legal scholarship, even a hint of concern in the legislatures,[3] and, perhaps most significantly, the concern of correctional administrators themselves.[4]

The primary purpose of this work is to describe and analyze legal trends in the area of corrections and to offer some suggestions about how corrections might respond. However, in order to do this properly it is necessary first to broaden the inquiry beyond corrections, indeed beyond the criminal process. To begin with sentencing and then proceed to probation, imprisonment, parole and restoration of civil rights would perpetuate the false notion that corrections somehow stands apart from the rest of the legal system and is unaffected by change occurring elsewhere.

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[1] The formal referrents of the correctional process are: sentencing and probation, institutional confinement, and parole. The correctional process also may be defined as all that occurs after conviction and prior to discharge from the control of government. In addition, legal procedures such as restoration of civil rights and expungement of the conviction and of the records evidence concern about relief from the stigma of conviction even after discharge.

[2] *See generally* Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response,* 14 CRIME AND DELINQUENCY 1 (1968). Although the correctional position normally prevails, it is the increasing pressure, rather than the "wins and losses," that is significant.

[3] *See, e.g.,* CALIFORNIA JOINT LEGISLATIVE COMMITTEE, PENAL CODE REVISION PROJECT (Tent. Draft No. 1, September 1967).

[4] *See* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS, ch. 15 (3d ed. 1966).

The Broad Context of Legal Challenge

The correctional process has not suddenly been singled out from the criminal justice system, found wanting, and made the isolated object of legal concern. Quite the contrary. Concern about how public officials make decisions, how the government and public institutions seek to extend their aid or apply sanctions, is occurring on a broad front. Before surveying developments in the criminal justice process, we shall briefly examine four areas of governmental activity that are currently undergoing legal challenge to the existing order. The developments in these areas provide clues for the future development of the broad field of corrections.

Public Welfare

The vast public welfare field is being scrutinized for procedural regularity, for rationality and consistency, and for basic fairness in decision-making. The long-obscured issue of "poverty in the midst of plenty" has surfaced, and among the dozens of crucial items competing for attention is a heightened sensitivity to bureaucratic arbitrariness.[5] The cliches of "right" and "privilege" are giving way to a concept of *entitlement,* a concept that implies that those who are to be helped have a legitimate interest, and must have a voice, in the protection of *expectations* aroused by government.[6] Perhaps most important is the current trend of asking *what is happening:* who is making and applying what policy and with what effect? The old shibboleths are not dead, but they are being engaged.[7]

Lawyers have involved themselves in the problems of the poor in far greater numbers than ever before. The Office of Economic Opportunity has funded 250 programs employing nearly 1,600 full-time lawyers in 48 states. In addition to providing the needed day-to-day legal assistance to the poor – 290,000 cases in fiscal 1967 – the Legal Services Programs have achieved some victories of major impact. Perhaps foremost are the five cases which struck down continued residence as a precondition to the receipt of welfare benefits.[8] The issue now is on appeal to the Supreme

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[5] *See, e.g.,* Comment, *Texas Welfare Appeals: The Hidden Right,* 46 Texas Law Review 223 (1967).

[6] *See* Burrus & Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience,* 16 American University Law Review 199 (1967). The groundbreaking article in the field is Reich, *The New Property,* 73 Yale Law Journal 733 (1964).

[7] *E.g.,* in King v. Smith, 392 U.S. 309, 333 (1968), the Court overturned the "substitute father" rule as applied to A.F.D.C. payments.

[8] Harrell v. Tobriner, 279 F. Supp. 22, 30 (D.D.C. 1967), *prob. jur. noted sub nom.* Washington v. LeGrant, 290 U.S. 940 (1968); Smith v. Reynolds, 277 F. Supp. 65, 68 (E.D. Pa. 1967), *prob. jur. noted,* 390 U.S. 940 (1968); Ramos v. Health and Social Service Bd., 276 F. Supp. 474, 477 (E. D. Wis. 1967); Thompson v. Shapiro, 270 F. Supp. 331, 336-38 (D. Conn. 1967), *prob. jur. noted,* 389 U.S. 1032 (1968); Green v. Department of Public Welfare, 270 F. Supp. 173, 177-78 (D. Del. 1967).

Court. If the Court affirms, the Office of Economic Opportunity has conservatively estimated it will add about $130 million to the income of poverty-stricken families. Other major judicial successes have included prohibition of the punitive eviction [9] and an injunction against a threatened reduction of medical benefits to indigents in California.[10]

Juvenile Justice System

In many ways the juvenile justice system is more pertinent to corrections than the field of public welfare. To date, the major legal challenges have been aimed at the *adjudicatory* stage of the juvenile process. The intake and custody stages along with the dispositional-correctional stages have not been challenged in so basic a fashion as the process for determining *how* a youngster may be labelled delinquent.[11] Nonetheless, the judicial activity in the juvenile field has some clear messages for corrections.

The major decision is, of course, *In re Gault*,[12] where the Supreme Court held that juveniles had the right to notice of charges, the right to counsel, the right of confrontation and cross-examination, and the protection of the privilege against self-incrimination.

For our purposes, it is more important to emphasize what motivated the Court to take action in a field it had virtually ignored since its inception than to analyze the niceties of the decision. Justice Fortas, writing for the majority of the Court, acknowledged that "the highest motives and most enlightened impulses" led to the creation of the juvenile court movement. However, the gap between expectation and performance, whether caused by inadequate theory or inadequate resources, proved to be so wide as to invoke the Court's power to impress constitutional safeguards on the process. The key factor is the Court's emphasis on the wide gap between what the juvenile system set out to do – provide "help" in a nontraumatic and nonstigmatic proceeding – and what it has been able to do — become, in effect, a criminal process for children offering neither effective help nor procedural safeguards.[13]

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[9] Edwards v. Habib, 397 F.2d 687, 699-701 (D.C. Cir. 1968).

[10] Morris v. Wilkins, 67 Cal. 2d 733, 757, 433 P.2d 697, 710-11, 63 Cal. Rptr. 689, 702-03 (1967).

[11] *See generally* Rubin & Smith, *The Future of the Juvenile Court: Implications for Correctional Manpower and Training,* Joint Commission on Correctional Manpower and Training (Washington, 1968).

Parenthetically, this concern in the juvenile process is to be distinguished from the criminal justice system proper, where the intake (arrest)-custody stages have been broadly challenged and the dispositional-correctional stages, our major concern, are just beginning to come under judicial scrutiny. In particular *see* Mempa v. Rhay, 389 U.S. 128 (1967), which, at a minimum, requires that all jurisdictions make provision for legal counsel at sentencing and probation revocation and of necessity implies a constitutional right to a hearing at sentencing and revocation. (For further discussion of *Mempa* see pp. 35-37).

The *correctional* stage of the juvenile process is discussed in detail in the final section of this paper.

[12] 387 U.S. 1 (1967).

Gault speaks to corrections on yet another point. The juvenile process managed to avoid the procedural requirements of the criminal justice process by the rather simple expedient of calling itself a *civil* proceeding. The judge was viewed as a "wise parent" acting only in the best interests of the child and representing the state in its *parens patriae* capacity. Since a child was not charged with or convicted of a "crime" but merely found in the condition of delinquency and since the state sought only to help and not to punish, the proceedings could be denominated civil and the child spared the rigors of the criminal law.

In *Gault,* however, the Court took notice of the fact that delinquency is indeed a stigmatic term and that, call it what you will, the process involves a deprivation of liberty in its most fundamental sense. The Court served notice that labels are not the final determinants of legal safeguards, that the use of such words as custody instead of arrest, detention instead of jail, and adjudication instead of conviction does not nullify the necessity for basic fairness.

A third lesson is to be derived from *Gault* only by implication or, as some lawyers put it, by a "creative reading" of the case. There appears to be an unarticulated assumption that when laws are enacted to provide help, the basic text of the law must of necessity be quite broad. Juvenile Codes, for example, often include as a condition of delinquency one who "habitually so deports himself as to injure or endanger the morals or health of himself or others; or habitually associates with vicious and immoral persons."[14]

Such broad categories of delinquency have a pervasive effect on the way in which the system is administered. They represent a grant of vast discretion to law enforcement and prosecution, the courts, and the correctional process. The ostensibly legitimate range of choices [15] available to those who invoke, apply, and administer the available sanctions is so great that who is screened in or out of the process becomes a matter of idiosyncratic choice. The point is that such a broad grant of authority permits those who operate within the system to develop their own policy, for good or evil, and also allows them to operate in a random, *ad hoc* fashion and perhaps "discover" policy by looking back to determine what has been done.

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[13] *See also* Kent v. United States, 383 U.S. 541, 561 (1966), in which the Court held that in the District of Columbia, assistance of counsel is essential for the purposes of the Juvenile Court's waiver of jurisdiction to the criminal court. *Kent* also held that counsel was entitled to full disclosure of the social service files. *Id.* Many legal scholars argue that *Gault* makes *Kent* applicable to all jurisdictions and that it is reasonable to infer a broad right of disclosure of social records, including presentence reports, in all manner of proceedings where "liberty" is an issue.

It should be noted that in *Gault* the Court evidences at least as much concern about the performance of other judges as it does about correctional personnel. If this is regarded as an "it's nothing personal" remark, it should also be taken as an indication of concern for decision-making processes without regard to who makes them.

[14] *E.g.,* TEX. REV. CIV. STAT. ANN. art. 2338, §3 (f), 3 (g) (1964). For other examples see Ketcham & Paulson, CASES AND MATERIALS RELATING TO JUVENILE COURTS, 54-65 (1967). The New York Family Court Act, §712 (b), has a new category — "a person in need of supervision" — for the habitually truant, beyond parental control, incorrigible-type charges.

While *Gault* does not directly address itself to the problem of statutory ambiguity,[16] at a minimum, it assumes the involvement of more attorneys in the juvenile process, and, as more attorneys begin to represent juveniles, it is inevitable that vague statutes – like those that abound in the area of corrections – will be challenged.[17] Corrections would be well advised to compare the law of its own existence with that of the juvenile process. It will be discovered that in probation and parole the policy and criteria governing the grant, the supervisory period, and termination are so vague as to provide little or no direction to those in authority or to those whose lives are sought to be regulated.[18]

Commitment of the Mentally Ill

The public mental health field shares many of the characteristics of the correctional process:

1. It holds itself out as a "helping" field.
2. It has available the use of officially sanctioned coercion to achieve its objectives.
3. There is little or no agreement on objectives: "cure," "remission," "resocialization," "protection of the community and/or the individual" all compete for primacy.
4. The field is woefully underfinanced and, as a consequence, is poorly staffed.
5. There is some distrust of law and legal process and an emphasis on relaxed procedures and the "expertise" of the treaters.

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[15] Use of the word "legitimate" may be questionable. In the above context, it means choices within the law's grant of apparent authority.

[16] The Court does, however, require reasonably specific notice of the charge, and there is an intimate relationship between specificity in the charge and the law under which the state charges.

[17] For a discussion of the various roles required of an attorney, see Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court,* 12 BUFFALO LAW REVIEW 501 (1963).

[18] *See Symposium on Juvenile Problems: In re Gault,* 43 INDIANA LAW JOURNAL 523-676 (1968).

6. There is an increasing emphasis on the need for prevention, early diagnosis, and community treatment.[19]

The public mental health field has not experienced the same form of legal challenge as public welfare and the juvenile process. Only recently has legal scholarship turned its attention to the area. The courts, for the most part, have been silent.[20] Curiously, the mental health movement has managed to keep the issues on substance and to bring the debate to the legislative arena, an arena many believe to be more appropriate than the judicial for mental health *and corrections*.[21]

The civil commitment process, however, will not long escape legal challenge. There simply are too many people who are deprived of their liberty for too long by procedures that are at least questionable and who receive "help" that may be little more than custodial and "tranquilizing." [22] The civil commitment process is disturbingly like the juvenile process: "help" is more an expectation than reality, administrators exercise a vast and unreviewable discretion, and labels are used to camouflage actual occurrences.

By highlighting these issues in a work that is concerned with law, there is a natural inference to be drawn that law and lawyers will provide *the* answers. No such implication is intended. Indeed, the author is convinced by observation that lawyers have little notion either of their own role or of how to protect their clients in the civil commitment process.[23] However, the lamentable fact is that if fair and discriminating decisions are not made by those who administer this or any other "helping" system, lawyers and the legal process are the only viable alternative. The basic mission of the legal process is, after all, to perform an *individualizing* function; to translate the generalities of legislation into the specific terms of a case. When the case involves an individual faced with the prospect of a loss of liberty and of the social consequences of the label "mentally ill," we must insist on accuracy and fairness.

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[19] *See generally* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS LAW REVIEW 424 (1966). There are, of course, some basic differences. For example, corrections, as an aspect of the criminal justice process, finds its "clients" are selected by others. The manner in which the civil commitment process operates generally allows the treaters to participate in the selection process. The "treatment" versus "reintegration" debate has no identical counterpart in mental health in which the rhetoric of treatment is used to describe almost anything done to or for a patient. In addition, we are all aware of the not-so-amusing examples of hydrotherapy (showers), vocational therapy (mopping halls), and milieu therapy (pure custody). Another significant difference is that many civil commitments are for an indefinite period while correctional treatment generally has a ceiling that is more or less related to the nature of the antecedent conduct.

[20] Notable exceptions are Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). *See also* Baxstrom v. Herold, 383 U.S. 107 (1966). *Rouse* and *Lake* have caused a flurry of concern in that they suggest that whenever a person is deprived of his liberty because of a status or condition there is a substantive right to receive adequate treatment or be entitled to immediate release.

[21] Legislatures are theoretically more amenable to basic policy considerations and to overall revision *vis à vis* crisis-oriented change than are the courts. More important is that legislatures are able to fund and thus to implement change.

[22] *See* Berelson & Steiner, HUMAN BEHAVIOR 287 (1964) in which the authors report: "There is no conclusive evidence that psychotherapy is more effective than general medical counseling or advice in treating neurosis or psychosis. Strictly speaking, it cannot even be considered established that psychotherapy, on the average, improves a patient's chances of recovery beyond what they would be without any formal therapy whatsover."

Student Rights

Only recently has the term "student rights" begun to acquire any meaning. In the past, no one seriously questioned the power of administrators to expel a student without notice and without the semblance of a hearing.[24] The courts not only expressed a toleration for arbitrary action but approved it.[25] In an early New York case, the state court actually upheld the discipline of a university student because she was found to be not "a typical Syracuse girl."[26] In 1917, a student was not permitted to register for his senior year at Columbia University because of his antiwar and antidraft speeches. The New York court held that he must not be permitted to inculcate "impressionable young men" with the "poison of his disloyalty"; his behavior was characterized as "culpable and cowardly."[27]

Charles Frankel recently stated, "It has finally come to be accepted that American colleges and universities are in trouble."[28] The student movement can hardly be blamed as the cause — to do so is akin to blaming the doctor for the illness he diagnoses — but it surely has exposed the problems and made reform an urgent issue. The movement, however, whether judged successful or not, has succeeded in exposing the inner workings of the university. Student apathy is giving way to activism; the separation of the university from the community is being breached; university students are demanding an end to the *in loco parentis* theory; and administrators and faculty have been forced to confront the reality of their behavior instead of continuing in the comfort of ritualistic adherence to the past.[29]

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[23] *See* Cohen, *supra* note 19.

[24] Annot., 58 AMERICAN LAW REPORTS 2d 903, 908 (1956).

[25] Sherry, *Governance of the University: Rules, Rights, and Responsibilities,* 54 CALIFORNIA LAW REVIEW 23, 28 (1966).

[26] Anthony v. Syracuse University, 224 App. Div. 487, 489, 231 N.Y. Supp. 453, 437 (1928).

[27] Samson v. Trustees of Columbia University, 101 Misc. 146, 151-52, 167 N.Y. Supp. 202, 207 (Supreme Court 1917). *See also* Smith v. Board of Education, 182 Illinois App. 342 (1913); Vermillion v. State *ex rel.* Englehardt, 78 Nebraska 107, 110 N.W. 736, (1907).

[28] Frankel, *Student Power: The Rhetoric and the Possibilities,* SATURDAY REVIEW, Nov. 2, 1968, at 23.

[29] *See* THE NEW STUDENT LEFT 215-218 (Cohen & Hale, eds., 1967).

It was the civil rights movement that first brought the issue of procedural and substantive arbitrariness of university officials into the judicial spotlight. The leading case is *Dixon* v. *Alabama State Board of Education,* which involved the expulsion of students from a tax-supported college after their participation in civil rights activities.[30] The students were not given notice of the "charges" against them nor were they given any opportunity to explain their conduct. Expulsion was upheld by the district court on the basis that petitioners had no *vested right* to attend the college. The court said that the regulations of the board of education indicated that attendance was based on a contract theory, and that students waived the right to notice and hearing as a condition of attendance.

The court of appeals quoted the pertinent regulation:

> Attendance at any college is on the basis of a mutual decision of the student's parents and of the college. . . . Just as a student may choose to withdraw from a particular college at any time for any personally determined reason, the college may at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult.[31]

and added its own interpretation:

> We do not read this provision to clearly indicate an intent on the part of the student to waive notice and a hearing before expulsion. If, however, we should so assume, it nevertheless remains true that the state cannot condition the granting of even a privilege upon renunciation of the constitutional right to procedural due process.[32]

The court did not allow itself to become enmeshed in the right-privilege distinction that clogs analysis of correctional decision-making. Rather, it held that a student has an "interest" in his continued attendance, described in the following terms:

> The precise nature of the interest involved is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of citizens.[33]

Once the court had determined that the petitioners had an interest which had been adversely affected, and had noted that there had been no showing that other colleges were willing to accept petitioners, it followed that the expulsion of petitioners without notice and hearing constituted a denial of due process prohibited by the Fourteenth Amendment.[34]

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[30] 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

[31] *Id.* at 156.

[32] *Id.* This doctrine has come to be called "the doctrine of unconstitutional conditions" and has, as we shall see, direct application to the correctional process. See pp. 42-44.

[33] *Id.* at 157.

Beyond the quest for procedural fairness, the student rights movement has come to include a quest for broader participation in the decision-making processes of the university. Students seek to influence the curriculum, the character of the teaching staff, the rules of campus life, the composition of future student bodies — in short, the nature of the university. The pressure for some form of "university democracy," in turn, exerts pressure on existing administrative structures and the composition of policy-making and administrative bodies, from the trustees to the faculty committees.

It is doubtful if corrections will experience a similar movement from "within." However, the criminal offender and the student join voices in saying that they are not merely objects to be acted upon. The search is for a new identity and, as a consequence, a set of new responsibilities that arise from a set of new relationships. Just as public universities can no longer hand out "education" to benign and grateful students, corrections may find it increasingly difficult to dispense "correction" to the nonperson described by such terms as "felon" or "convict."

Interrelationships

Our consideration of the developments in public welfare and student rights was designed to illustrate movements of the "disadvantaged" in the direction of establishing new relationships with public institutions and the government as well as a new sense of identity. If public welfare and student rights are somewhat marginal to corrections, the juvenile process and the commitment of the mentally ill are more parallel tracks. The latter areas represent alternatives to the traditional criminal process and, as pointed out, are sufficiently analogous to corrections to view developments there as a barometer for correctional change. The lesson seems clear: persons who are classed in a deprived or dependent status — whether it be welfare recipient, student, juvenile, or mentally ill — are seeking to alter the social and legal consequences of that status. Under particular stress is the notion that when a governmental or public entity seeks to provide help or largess, the grateful recipient has little or no procedural or substantive claims. The quest in these areas is for greater personal autonomy, a voice in the management of these programs, and a demand that decision-makers be accountable. There is no reason to believe that corrections will remain immune from similar challenges. Yet, one detects in corrections no awareness and no concern with legal developments unless they are immediate, direct, and crisis-provoking.

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[34] The due process requirements in *Dixon* have been extended in a number of subsequent decisions, Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 758-61 (W.D. La. 1968); Buttney v. Smiley, 281 F. Supp. 280, 288 (D. Colo. 1968); Dickey v. Alabama State Board of Education, 273 F. Supp. 613, 618 (M.D. Ala. 1967), *aff'd mem.*, 394 F.2d 490 (1968); Due v. Florida Agricultural and Mechanical University, 233 F. Supp. 396, 401-03 (N.D. Fla. 1963); Goldberg v. Regents of California, 248 Cal. App. 876, 57 Cal. Rptr. 463 (1967), and have even been broadened to include *suspension* from a tax-supported institution, Knight v. Board of Education, 200 F. Supp. 174, 178 (M.D. Tenn. 1961). *See also* Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1968), following *Dixon* and *Knight*, in which the court suggested, under threat of an order, that a hearing be granted a graduate student applying for *readmission*.

The Criminal Justice Process and Constitutional Challenge

One message for corrections is so clear that it deserves mention at the outset without regard to sequence or a detailed foundation. In the late 1950's and early 1960's anyone giving even superficial attention to what the judiciary – the Supreme Court in particular – was saying to law enforcement could hardly misunderstand the message. Time and again the Court reviewed practices that it characterized as "shocking the conscience,"[35] "measures flagrantly, deliberately, and persistently violating fundamental principles."[36] Yet agencies of law enforcement and prosecution pressed close to the line of constitutionality as a matter of regular practice and appeared to overstep the line with sufficient regularity to finally move the Court to a series of broad, reformatory rulings.[37]

An instructive example is the Court's treatment of the Fourth Amendment's protection against unlawful search and seizure. Until 1949, the Court's position was that the Fourth Amendment applied only to the federal government and that objections to the "search and seizure" activity of *state* officials would be reviewed, if at all, by the more abstract and *more permissive* standard of "fundamental fairness" embodied in the "due process" clause of the Fourteenth Amendment. In *Wolf* v. *Colorado,*[38] the Court found that the security of one's privacy against arbitrary intrusion by the *state* police was "implicit in the concept of ordered liberty" and was required by the standard of fairness. This, in effect, made the substance of the Fourth Amendment applicable to the states through the operation of the due process clause.

Now, suppose a state agency did violate the security of one's privacy and seized evidence later used to convict that person of a crime. Did any constitutional rule operate to exclude such evidence from trial or require a reversal if the evidence was admitted and proved to be a factor in the conviction? *Wolf* said no, and thus stopped short of requiring that the states adopt what is known as the "exclusionary rule." The Court in *Wolf* said, in effect, we serve notice that basic rights are involved and while we are aware of the regularity with which they are violated, we prefer that the states act on their own to design methods to effectively control unconscionable police activity.

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[35] *See, e.g.,* Rochin v. California, 342 U.S. 165, 172 (1952).

[36] Irvine v. California, 347 U.S. 128, 132 (1954).

[37] Brown v. Mississippi, 297 U.S. 278 (1936) was the first case in which the Supreme Court held a confession invalid under the due process clause of the Fourteenth Amendment. The deputy who presided over the beatings of the defendants conceded that one prisoner had been whipped but "not too much for a Negro; not as much as I would have done if it were left to me." Lockhart, Kamisar, & Choper, CONSTITUTIONAL LAW 653 (2d ed. 1967).

[38] 338 U.S. 25 (1949).

Twelve years later Justice Clark, a former Attorney General, wrote the historical opinion in *Mapp* v. *Ohio*.[39] Justice Clark observed that some states had indeed moved to provide procedures that would protect the right of privacy guaranteed in the Fourth Amendment, but that where means other than the exclusionary rule prevailed (*e.g.*, police disciplinary proceedings, civil suits for damages) they had been "worthless and futile." He further stated that once the right of privacy was recognized as enforceable against the states, the Court could "no longer permit that right to be an empty promise"; it could "no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement, chooses to suspend its enjoyment."

With these words, the Court embarked on a series of decisions that would alter the entire course of federal-state relations in the field of law enforcement. *Mapp* was the opening shot in the battle to reform law enforcement practices. Yet if a positive response from the state legislatures was to be expected, one searches in vain for it. To date, no state has adopted a comprehensive code of pre-arraignment procedures.[40]

Corrections today appears to be in a position similar to that of law enforcement prior to 1961, that is, prior to *Mapp*. As was indicated earlier, the messages are being relayed from a variety of sources — courts, commissions, scholars — and the question is *how* corrections will respond. Should corrections choose to stand pat — as enforcement agencies did in the period between *Wolf* and *Mapp* — increased judicial intervention in the area is likely. If there is sweeping judicial activity in corrections, it will no doubt precipitate a crisis, as the Court's *Escobedo*[41] and *Miranda*[42] decisions did in the pre-arraignment enforcement process.

That we must often have crisis to stimulate change is a lamentable fact. If corrections is convinced of the need for change, and is able to mobilize itself in the precrisis stage, one can predict that it will be able to control its own destiny to a far greater extent than if it waits. Crisis tends to polarize opinion and to take the decisions away from those who are most directly affected. How corrections properly might react now — and therefore guide its own future — depends largely on an understanding of the requirements of the due process clause of the Fourteenth Amendment, which constitutes the template against which changes in the correctional process must be measured.

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[39] 367 U.S. 643 (1961).

[40] The American Law Institute, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, March 1966) was an abortive effort to formulate a model code that could be adopted by the states. The ruling in the *Miranda* case, however, short-circuited that admirable but tardy effort.

[41] Escobedo v. Illinois, 378 U.S. 478 (1964).

[42] Miranda v. Arizona, 384 U.S. 436 (1966).

Due Process Norms

Why is it that lawyers and courts persist in raising challenges to the *manner* in which decisions are reached? Are words of caution, indeed of restriction, offered only to denigrate the motives of those who wish only the best for the people put in their charge? Why should those who seek to help be forced to go over legally imposed hurdles that impede, and at times eliminate, the possibility of help? Even if law and legal process do some good, are they worth the costs involved?

These, of course, are fundamental questions. They require rather complex answers and — as we shall see — where answers are possible, they relate to specific areas rather than to the broad area of social control through law. An effort must be made to deal with these questions because unless the field of corrections has some notion of what is meant by the rule of law and the objectives of legal challenge, there is little possibility for meaningful change.

As the *Mapp* case indicates, the due process clause can serve as a conduit through which specific protections of the Bill of Rights are made applicable to the states. Through the due process clause, the privilege against self-incrimination, protection against illegal search and seizure, the right to a speedy trial, the right to compulsory process, the right of confrontation and cross-examination, protection against cruel and unusual punishment, right to counsel, and the right to a jury trial, all have been made applicable to the states.

But the due process clause is more than a mere conduit; it also has an independent content. Justice Douglas was referring to this independent content when he wrote, "Due process, to use the vernacular, is the wild card that can be put to such use as the judges choose."[43] Thus far, the judges have not often played their wild card in encounters with the correctional process. Those encounters are increasing, and with the "wild card" available it is important that corrections understand what values are sought to be protected by due process norms, to estimate if current procedures achieve those values, and, if not, how best to correct and remodel them.

Perhaps the most basic explanation of the independent content aspect of due process — and clearly the most open-ended — is *fundamental fairness*. From the term, "fundamental fairness" flow such concepts as "impartiality," "honesty," "conformity with existing rules," "objectivity," and "proper balancing of competing interests." Although these overlapping concepts give almost no direction on solving a specific problem, they do set a tone; they emphasize the need to seek *normative* guidance as opposed to the most logical or efficient solution. Functionally, due process norms assume that there are and must be limits on the power of government.[44] Where due process has not received specific application, as

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[43] Douglas, *The Bill of Rights is Not Enough*, 38 NEW YORK UNIVERSITY LAW REVIEW 207, 219 (1963).

[44] *See* Packer, *Two Models of the Criminal Process*, 113 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1, 13-23 (1964).

Justice Douglas has said, it serves as a healthy reminder to officials that power is a heady thing and that there are limits beyond which it is not safe to go.[45]

Much of the work of lawyers and legal tribunals involves the reconstruction of past events — the fact-finding process — as a basic component of the adjudicatory (or dispute-settlement) process. Due process is one of the controls on the ascertainment and the use of facts, and this control has been expressed in terms of assuring *reliability*[46] in fact finding by use of the twin concepts of *notice* and *hearing*. The most fundamental aspect of due process is that no person shall be deprived of life, liberty, or property without an opportunity *to know* and *to be heard*. The right to be informed and the right to challenge — to be a participant in official decisions respecting an individual's interests — is at the core of due process.[47]

By way of contrast, spokesmen for the correctional process often emphasize the *conclusion* (*e.g.*, a "bad risk," "immature," "unfit to remain at large") and the *good faith* or *expertise* of the person making a decision.[48] While facts and conclusions need not be at war with each other, too often this is the case. Conclusions, particularly when couched in diagnostic or legal terms — or when used as manipulative labels — easily may divert our attention from an inquiry into the factual foundation for the conclusion. It is much more convenient to say that a person is "sick" or "dangerous" or "not ready for parole" than to establish the facts and the steps used to arrive at such a conclusion.

It is clear that the fundamental requirements of notice and a hearing,[49] and other residual norms such as visibility and consistency,[50] actually impair efficiency and effectiveness: *and that is precisely what they are intended to accomplish.* Orderliness, the step-by-step development of a case, an active role for counsel and his client, and demands for proof, require more time than an *ex parte* determination of a case. The considerable emphasis, then, that correctional decision-makers place on efficiency, effectiveness, and their expertise and conclusions creates a tension with due process norms. This particular problem pervades every aspect of corrections and legal change and should be kept in mind as we consider in detail the various stages of the correctional process. It should be remembered that due process norms are concerned with values that transcend the essential mission of the criminal law. Society seeks to prevent or, more realistically, reduce criminality and to discover, apprehend, and apply sanctions to those who are not deterred. Due process norms dictate that this be accomplished within a set of rules that assure the dignity of the individual and require that government observe the charter of its own existence.[51]

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[45] Douglas, *supra* note 43, at 211.

[46] Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 Yale Law Journal 319, 341 (1957). Reliability is also the core of the decision in Linkletter v. Walker, 381 U.S. 618, 638-39 n. 20 (1964).

[47] *See generally* Kadish, *supra* note 46.

[48] *See, e.g., Ex parte* Young, 121 Cal. App. 711, 714, 10 P.2d 154, 156 (1932).

[49] The frequent and heated debates concerning hearings at various points in the correctional process rarely specify what is meant by the term "hearing." Although the term is ambiguous, when referring to an adversary situation — where opposing parties present conflicting claims and seek an authoritative decision — there is some accord on the attributes of such a hearing. Justice Douglas, in the recent case of Specht v. Patterson, 386 U.S. 605 (1967), described those attributes as follows: "Due Process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." *Id.* at 610. This type of hearing often is referred to as a *trial-type proceeding*. Such a hearing is believed to be best suited for resolving issues of fact.

At the other extreme is a type of hearing characterized as an *argument-type hearing*. Here there is no substantial disagreement on facts — they either have been officially resolved or agreed to by the parties — and the controversy concerns law, policy, or the exercise of discretion. *See* Davis, Administrative Law Treatise §§7.01-20 (1958).

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[50] Both of these concepts address the problems of assuring respect for human dignity and making certain that government observes its own rules. Indeed, the concept of visibility receives explicit recognition in the Sixth Amendment's requirement of a "public trial." Consistency in the application of principle is, in a sense, the obverse of arbitrariness. The equal protection clause of the Fourteenth Amendment commands an obedience to a form of consistency, but it "has been used by the courts chiefly as a basis for the criticism of legislative classification." Tussman & ten Broeck, *The Equal Protection of the Laws,* 37 CALIFORNIA LAW REVIEW 341, 356 (1941). Our primary concern with consistency—and visibility—is at the level of the application of principles.

[51] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

II. CORRECTIONS AND LEGAL CHANGE: SENTENCING

Any survey of contemporary developments in corrections is a melancholy experience. President Franklin D. Roosevelt, addressing the First National Conference on Parole in 1939 stated:

> Much of the criticism which we have heard directed at parole is due to the fact that while forty-six . . . of our states have parole laws, less than a dozen have provided the money and the personnel which are necessary to operate a real parole system. Some of the criticism is due, too, to the fact that parole power sometimes has been used to grant political or personal favors.[1]

In 1967, the report of the President's Commission on Law Enforcement and Administration of Justice included as one of its seven basic recommendations that "correctional agencies" will require substantially more money if they are to better control crime.[2] By now the refrain is distressingly familiar: too little money, inadequate personnel with insufficient training, too great a reliance on the most punitive sanctions, inadequate data and research, and a pervasive injustice.

The discussion of legal norms and corrections will be divided into sentencing, probation and parole, imprisonment, and loss and restoration of civil rights. A separate section will discuss the correctional issues peculiar to the juvenile process. Although there is some obvious overlapping, especially in the areas of sentencing and probation, this approach permits a sequential and thus orderly consideration of the peno-correctional process.

Sentencing Structures and Disparity

The sentencing decision is, of course, the first official step in the correctional process. The sentencing authority operates within a legal framework that maximizes discretion both as to the terms and conditions of the sentence and the procedure by which the sentence is determined.

In our legal system the principle of *nulla poena sine lege*[3] is axiomatic; no penalty may be imposed without a law. Since our criminal law is almost exclusively legislative law (it is our *procedures* that flow from the Constitution) sentencing, in the first instance, is a legislative question. Left to their own devices the legislatures have developed a staggering number of sentencing structures and, within those structures, have provided the sentencing authority with so much leverage that illogical disparities are virtually guaranteed.[4] Whether a particular offense should carry a statutory maximum of five, ten, or twenty-five years; whether sentences should be determinate or indeterminate; whether mandatory minima or maxima should be used; whether probation or parole should be available for certain types of offenders – these are the kinds of decisions arrived at independently by each legislature.

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[1] NATIONAL CONFERENCE ON PAROLE, PAROLE IN PRINCIPLE AND PRACTICE: A MANUAL AND REPORT 7 (1957).

[2] President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, *Summary* X (1967).

[3] This is an aspect of what Jerome Hall calls the principle of legality. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 55-58 (2d ed. 1960).

[4] *See generally* Glaser, Cohen, and O'Leary, THE SENTENCING AND PAROLE PROCESS (U.S. Dept. of Health, Education, and Welfare 1966).

As an example of the great variation in the legislative response to similar or identical offenses among the various jurisdictions, consider the following:

> The longest term for burglary with explosives in Louisiana is less than the shortest term in Mississippi and the minimum in the latter state is five times the minimum in the former. The minimum penalty for armed burglary is one year in ten states, five years in twelve, and death in two. Whereas the minimum penalty for unarmed burglary is one year in eight states, it is a life sentence in one state. . . . For rape, minima vary from one year in six states to death in four. [Often no distinction is drawn between forcible rape and consensual intercourse with an underage female.][5]

If the variations were based on some apparent special interest of the state or something unique about the characteristics of the state, the variety might be explainable; but there does not appear to be any such rational basis for these differences.

Not only is there utter inconsistency and irrationality in the sentencing structures *among* the various jurisdictions, the same is true *within* a single jurisdiction. For example, within the Federal Penal Code (now undergoing a thorough revision) one finds such examples as arson with a five-year maximum, which is raised to twenty years if the building was a dwelling or if life was endangered.[6] Thus, if an unoccupied house is burned, the penalty can be as high as twenty years, but if an unoccupied school or theater – or if the Capitol – is burned without endangering life, the sentence cannot exceed five years. Armed robbery of a *bank* is punishable by a fine, probation, or any term not to exceed twenty-five years, while armed robbery of a *post office* offers only the choice of probation or twenty-five years.[7]

The *Model Penal Code of the American Law Institute*, the *American Bar Association Minimum Standards* and, in addition, the *Model Sentencing Act of the National Council on Crime and Delinquency* represent important advances in our approach to the irrational and inconsistent sentencing structures found in our penal codes. While there are important variations between the proposals, four major principles are consistently adhered to:

1. There is a clear preference for a small number of sentencing categories.

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[5] Taft, Criminology 327 (1950).

Those states that recently have revised their penal codes have reduced the number of sentencing categories by patterning their codes on the *Model Penal Code*.

[6] 18 U. S. C. §81. (1950).

[7] 18 U. S. C. §2114. (1951).

2. Sharply reduced sentences for most offenses are recommended.
3. There is an effort to identify for special dispositional treatment the "dangerous offender."
4. The basic philosophy for "ordinary offenders" is to base the sentencing range on a formula which increases the severity of the sentence in relation to the seriousness of the misconduct.

Plea Bargaining

The entire criminal justice system is set up for the mass processing of defendants. A judge once wrote that if all those who are accused of crime were to refuse to plead guilty on any given day the entire system of criminal justice would break down. The threat of trial then is not only a sword in the hands of the prosecutor but also a shield behind which the accused can obtain concessions. The accused, however, are like an unarmed mob facing one man with a loaded gun – no one is willing to take the first step.[8] Undoubtedly, the plea of guilty is the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of all criminal cases are disposed of in this way.[9] Only the most naive can believe that a significant number of these guilty pleas result from pangs of conscience, indicate the first step toward repentance, or show a willingness to assume responsibility for one's conduct. Guilty pleas, by and large, are the result of bargaining sessions where the plea is offered in return for charging and sentencing concessions.[10] Indeed, many more criminal cases are "tried" – and "convictions" and "sentences" obtained – in the corridors than in the courtroom.

Formerly, plea bargaining was one of those "secrets" that everyone knew about but no one officially recognized. Today, the matter has surfaced, and efforts are being made not to abolish the practice but to regulate it. We have learned that "Criminal law administration prior to conviction is almost totally dominated by sentencing and dispositional considerations in practice. . . ."[11]

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[8] Lummus, The Trial Judge 46 (1937).

[9] *See generally* Newman, Conviction: The Determination of Guilt or Innocent without Trial (1966); ABA Project on Minimum Standards for Criminal Justice (hereafter referred to as ABA Project on Minimum Standards), Standards Relating to Pleas of Guilty (Tent. Draft, 1967).

[10] Guilty pleas are subject to a "voluntariness" test. That is, they must not be obtained by threats or promises of leniency. Typically, after the bargain is struck, the defendant and his counsel go through a charade where the judge solemnly asks the accused if any promises or threats have been made. The answer, with equal solemnity, is "No, your honor." *See, e.g.,* United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308, 310-11 (2d Cir. 1963).

[11] Bennett & Mathews, *The Dilemma of Mental Disability and the Criminal Law,* 54 American Bar Association Journal 467, 468 (1968).

Although it may not be readily apparent, the concept of bargained-for justice that results from the mass processing of the criminally accused is directly related to correctional decision-making. For example, mass processing results in reliance on "off-the-cuff" decisions that are often reached with inadequate or inadequately evaluated information. The information gap has a cumulative effect. By the time the offender reaches the correctional process, a series of critical, but frequently unreliable, decisions have been made, and despite their questionable validity they will serve as the basis for future activity by corrections.[12]

With trial processes viewed as the focal point of formal legal concern, but with the significant decision-making occurring outside the courtroom, how is it possible to argue for additional procedures in correctional decision-making? A short answer is that while the threat of trial overhangs and shapes what occurs in the plea-bargaining sessions, there is no analogue in corrections. In corrections, where the prospect of a successful challenge to the exercise of authority – and for accountability – is minimal, *ex parte* decision-making substitutes for negotiated decisions.

Sentencing Procedures – A No Man's Land

As previously noted, the criminal process is circumscribed by an elaborate network of procedural safeguards designed to protect the accused. At any point in the screening process – from arrest to trial – the accused has the theoretical power to require that the system justify its decisions. The power to require justification, however, slows almost to a standstill when guilt is pronounced. The Illinois Supreme Court described the offender's legal status at sentencing this way:

> Any person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him. . . . After a plea of guilty . . . instead of being clothed with a presumption of innocence they are naked criminals, hoping for mercy but entitled only to justice.[13]

It usually comes as a surprise that, until the recent decision in *Mempa* v. *Rhay*, the Supreme Court had never directly held that the right to counsel applies at sentencing.[14] *Mempa* makes no explicit reference to the question of whether or not a sentencing hearing is also a constitutional requirement. Again, it may be a surprise to learn that so basic a concept as a sentencing hearing would be open to some doubt as late as 1969.

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[12] *See* NYSIIS: System Development Plan 19 (1967). For example, the presentence report develops new information and builds on existing data that normally is not reevaluated. Not only is the report used in sentencing, but it follows the individual to prison and to the parole board. *See* Chappel, *Federal Parole*, 37 F.R.D. 207, 210-11 (1968).

[13] People v. Riley, 376 Ill. 364, 368, 33 N.E.2d 872, 875, *cert. denied*, 313 U.S. 586 (1941). An excellent discussion of the problem is found in Kadish, *The Advocate and the Expert – Counsel in the Peno-Correctional Process*, 45 Minnesota Law Review 803, 803-04 (1961).

However, it requires little in the way of a creative reading of *Mempa* to suggest that if there is a right to counsel at sentencing,[15] it follows that counsel must have some function to perform and some framework within which to perform it. That framework is a hearing and, whatever the specifics of the lawyer's function, he must have an opportunity to influence the course of the sentencing proceedings.

Even prior to *Mempa*, the general rule in this country was that the offender had the right to be physically present at sentencing. Indeed, if a felony offender absconded, he could not lawfully be sentenced until brought before the court. Tied to the right to be present at sentencing is the ancient concept of allocution – the offender's right to make a statement in mitigation.[16] Although there are no hard data available, it is likely that sentencing judges, particularly in the more serious offenses, have generally exercised their inherent power to give the defendant and his counsel, or both, wide latitude in introducing matters relevant to an informed sentencing decision.

Mempa's potential impact is to reduce the possibility of an arbitrary denial of the offender's presentation of sentencing information. The decision would seem to require that counsel be given a reasonable opportunity to present facts and conclusions, to rebut facts and conclusions offered by the state, and, more creatively, to present dispositional alternatives.[17]

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[14] 389 U.S. 128 (1967). For an extensive discussion of *Mempa, see* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa* v. *Rhay*, 47 Texas Law Review 1 (1968). Much of the material used in this section is drawn from that article.

The court came close to requiring counsel at sentencing in Townsend v. Burke, 334 U.S. 736 (1948) but based its decision on the special circumstances of the case rather than an absolute right to counsel at sentencing.

[15] By "right to counsel" we mean that an individual has the right to appear with retained counsel or, if unable to afford to retain counsel, one will be appointed to represent him. Actually, counsel who represents the individual at trial (or in "bargaining") usually will continue representation into the sentencing process.

[16] The earliest version of allocution was the opportunity to raise legal grounds that might prevent the imposition of sentence.

[17] For the "narrow" view of the offender's rights at sentencing, *see* Hoover v. United States 268 F.2d 787, 790 (10th Cir. 1959). *Cf.* Jay v. Boyd, 351 U.S. 345, 355 (1956). Price v. United States, 200 F.2d 652, 654 (5th Cir. 1953); United States v. Rosenberg, 195 F.2d 583, 609 (2d Cir.) *cert. denied,* 344 U.S. 838 (1952). *But see* Leach v. United States, 353 F.2d 451, 452-454 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 963 (1966).

Counsel and Sentencing

Many observers believe that in the past lawyers have been unable or unwilling to play an important role in the sentencing process,[18] but lawyers now have been judicially spurred by *Mempa* to maximize their effective participation. Thus an important question is: What is a lawyer's new scope of responsibility in sentencing?

Counsel to be effective cannot be content to show, for example, that his client is a war veteran with a family to support – the kind of presentation that now is so typical.[19] His new role, both in bargaining and in the presence of the sentencing authority, is to gather and evaluate relevant facts, to suggest positive programs of rehabilitation, and, at times, to create dispositional alternatives.[20] If probation does not seem feasible, counsel could attempt to influence the term of years and perhaps the place and conditions of confinement.[21] He can and should work with the probation staff when the presentence report is being prepared, and he may legitimately attempt to influence its content and the recommendations. Since the classical position of probation and the legal profession is that information developed on behalf of their "clients" need not be shared, it is obvious that this proposal requires a basic reassessment of the respective roles of defense counsel and the probation officer.

The informal processes of adjudication and sentencing which dominate the system depend on a form of cooperativeness. Plea bargaining simply could not occur regularly if both parties were strident adversaries who marched to the blare of war trumpets. It is not novel to suggest the inevitability of defense counsel and the probation staff working together much as counsel and the prosecutor must work together. If agreement on the disposition exists, then obviously the problems are minimal. If there is disagreement, either on facts or conclusions, the inherent adversariness of the situation emerges and calls for a presentation to the court — a hearing.[22]

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[18] "It is unfortunately too often the case that the defense attorney considers his job completed once he has assisted the defendant through the guilt phase of the proceedings and perhaps jockeyed for the most lenient sentencing judge." ABA Project on Minimum Standards, Sentencing Alternatives and Procedures 241 (Tent. Draft. 1967).

"On the other hand, there are reasons why counsel, in the traditional sense, may not serve a meaningful function at sentence. For one, sentences are generally nonreviewable by appellate courts so the function of defense counsel of 'making a record' in the trial court or before the administrative tribunal does not exist. For another, although the defendant may not be able to handle his own case at trial in chief, when it comes to making a statement in his own behalf at the time of sentence . . . ," he is the best one to do it. Schwartz, Cases and Materials on Professional Responsibility and the Administration of Criminal Justice 194 (1961). *But see* Hill v. United States 368 U.S. 424, 426 (1962); Green v. United States 365 U.S. 301, 304-05 (1960).

[19] In President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 19 (1967), the task force takes the position that counsel has a vital role in achieving the most appropriate disposition for his client.

[20] For example, counsel can explore the possibility of job training, open new avenues of employment based on personal contacts (the kind of thing an attorney will do for an affluent or "respectable" client), or pressure social agencies to do their jobs better or expand their function to include offenders. *See* Georgetown Law Center Institute on Criminal Law and Procedure, Report on the Offender Rehabilitation Project (1968).

[21] In most jurisdictions, an attempt to accomplish the latter would be futile because of the limited types of institutions and the relative autonomy of institutional personnel after confinement.

Presentence Report

Whether or not the presentence report should be disclosed is an issue that has been hotly debated in the courts and in the literature. Spokesmen for probation, and in this case that includes most trial judges, argue that forced disclosure presents the following problems:

1. There is the danger of drying up confidential sources of information.
2. Individuals and social agencies would be unwilling to cooperate if the content or source of the report were revealed.
3. Damage would be done to the casework process, since the offender would be hostile to the officer and the informant.
4. Probation staff would provide only brief or partial reports.
5. The defendant has no constitutional right to disclosure.

On the other hand, defense counsel argue that in order adequately to represent their clients at a sentencing hearing, they must have access to the materials on which the judge relies in disposing of the case. Yet under the adversary system the lawyer is under no duty to reveal to the court, the prosecutor, or the probation staff data which may prove harmful to the chances for a favorable disposition.[23]

One solution to this apparent standoff is to develop auxiliary sources, along the line of the Offender Rehabilitation Project at Georgetown University, and provide counsel with his own presentence report.[24] This proposed solution, however, merely highlights the sad reality that the narrow scope of the debate over disclosure has served to obscure the larger issue of the proper role and function of counsel and the probation staff in shaping an appropriate disposition. Disclosure is only one aspect of that issue and, indeed, is better stated as the *mutual* sharing of information relevant to sentencing.

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[22] When facts are in dispute, a trial-type hearing — including notice, the right to present witnesses, and the right to confront and to cross-examine witnesses — is in order. If facts are not in dispute, the parties may simply present their arguments to the court.

[23] For provocative discussions of the attorney's obligation not to disclose confidential communications, compare Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICHIGAN LAW REVIEW 1469 (1966) with Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICHIGAN LAW REVIEW 1485 (1966).

[24] Unfortunately, this approach has the inherent flaw of duplication of efforts. When resources are limited and the objective is to gather facts and to reach preliminary conclusions, the better long-range idea is to develop some neutral agency (or to develop neutrality *within* an existing agency) that will perform the function and share its findings.

There is some indication that despite continued judicial hostility and the lack of affirmative legislative action, the presentence report is losing its character as a "sacred writing." While the general rule in this country continues to be that there is no constitutional right to obtain disclosure of the report,[25] a few states (Alabama, California, and Virginia) impose statutory requirements of disclosure, and there is a sprinkling of court decisions either urging or directly commanding disclosure, particularly if the offender raises the question of prejudice.[26]

In addition to this modest trend toward recommended or enforced disclosure, some courts have begun to review the overall merit of the report or the inclusion or exclusion of a specified item. In an important New Jersey decision the defendant successfully argued that he did not have the benefit of a presentence report as required by statute. His complaint was that the writing actually submitted was inadequate and biased.[27] The court agreed and, in the process of remanding the case, articulated a critique and set of recommendations that is worthy of extensive quotation:

> The report . . . falls far short of what a presentence report should be. It does not even qualify as a complete and definitive Social Investigation (so captioned). It first gives defendant's name, address, age (48) and birthday. The offense is then described as Assaut and Battery. Under Previous Offenses there is an entry of a nonsupport charge in another county in 1948, although there is nothing to show that defendant has ever been married or fathered a child. Completely uninformative is a notation that defendant was committed to the New Jersey State Hospital in 1948. The reason for the commitment is not stated, nor does the report indicate when defendant was discharged or his mental condition then or now. Under "Previous Offenses" there are also notations of disorderly conduct charges . . . resulting in 10-day and 30-day county jail sentences.
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> The major part of the report is devoted to the 'Details of Offense." It is fairly obvious that these 'details' were obtained from the prosecutor's file. There would be nothing essentially wrong with this were the source of information given and, at the same time, defendant's version of what occurred laid before the judge.
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[25] This writer has argued, however, that *Kent* and *Mempa* combine to create a constitutional right to disclosure. *See* Cohen, *supra* note 14, at 22.

The recent amendments to the Federal Rules of Criminal Procedure reaffirm the judge's discretion on disclosure. FED. R. CRIM. P. 32(c) (Supp. 1968). In revising the rules, the draftsmen mistakenly relied on Williams v. New York, 337 U.S. 241 (1949). This case will be considered in some detail in the discussion of probation. *See* text accompanying notes 14-20 *infra*, Chapter III. *But see* United States v. Fisher, 381 F.2d 509, 512 (2d Cir. 1967), in which the court urged trial judges to be "liberal and generous" in their use of the power of disclosure.

[26] *See, e.g.,* State v. Pope, 257 N.C. 326, 334-35 126 S.E.2d 126, 133 (1962).

[27] State v. Leckis, 79 N.J. Super. 479, 486-87, 192 A.2d 161, 165 (1962).

> We find strong indications in the record suggesting that if defendant had been fairly interviewed by a probation department representative in whom he had some confidence, and the entire background of the occurrence disclosed, the degree of his offense might well have been tempered and his punishment proportionately lightened.
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> The rest of the report consists of a repetition of defendant's previous record, a very brief family history limited to names, ages, religion and residence of his father, mother and sister, his claim that he was never married, the fact that defendant attended school only through the eighth grade, his employment record, army record, army service record, religion and a notation that in his leisure time he admits to drinking too much.[28]

The court then goes on to state some guidelines:

> Preparation of a good presentence report requires that the probation department interview the accused as well as the accusers, summarizing their respective versions of the affair. The statement of witnesses is equally important, as is that of official investigation . . . . There is little in the report [on Leckis] that would give a judge an accurate idea of defendant's personal background — his mentality, personality, habits and the like — or of the family background which would give the case meaningful setting. So much depends upon the completeness and balanced presentation of a presentence report that anything less would fall short of providing the sentencing judge with the information he must have in order to impose a just sentence.[29]

Most courts have been much more permissive than the New Jersey court by allowing the report to contain hearsay, the prior criminal record, reports of psychiatric examinations, juvenile records, and evidence of cooperation with law enforcement officials. A question that has nagged the academics is whether evidence obtained as a result of an unlawful search and seizure could be used in a presentence report.

A federal court recently took a bold step and held that since "the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures, that evidence should be disregarded by the sentencing judge." [30] This is a unique holding and portends much for the future. For example, how can the offender and his counsel ascertain whether the judge considered illegally seized evidence in sentencing unless there is systematic access to the presentence report?[31] Does the decision cast doubt on the use of hearsay? Does it suggest a general right to examine the probation officer concerning the sources of his information?

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[28] *Id.*

[29] *Id.*

[30] Verdugo v. United States, 402 F.2d 599, 613 (1968).

[31] In a separate opinion, Judge Browning dealt with access to the presentence report and concluded that disclosure is indeed mandatory. *Id.* at 613-17. He reached this conclusion despite the fact that the Supreme Court transmitted the amended Rules of Criminal Procedure to Congress and, as noted, Rule 32 (c) makes disclosure discretionary.

There are other specific issues that are vital to the development of fair sentencing procedures. They include such issues as credit for time served while awaiting trial or sentencing; problems in the use of consecutive and cumulative sentences; and the use of diagnostic commitments and reports. These issues are, however, sufficiently removed from the primary concerns of this paper as to not require discussion.[32]

Appellate Review of Sentences

Finally, we turn to appellate review of the rationality of criminal sentences. Review of sentences may appear to be as far removed from the realm of correctional decision-making as the issues just mentioned, but, as we shall see, sentencing review practices have some important ramifications for corrections.

The general rule in this country is that an appellate tribunal will not disturb a sentence that is within the legal limits prescribed by statute.[33] An illegal sentence – one that exceeds the statutory limits – will be modified on appeal only to conform with the applicable law. If a sentence has been imposed in violation of some procedural right of the offender – *e.g.*, in the absence of counsel or without an opportunity for allocution – an appellate court will reverse and remand the case for resentencing. What normally is not available is review of the *rationality* of the sentence.[34] Such review is a particularly urgent issue in light of the vast discretion of the judge in sentencing. The leverage afforded him by unduly long maximum terms and the absence of agreed-upon sentencing policy and criteria results in needless disparity. Thus correctional agencies frequently inherit the bitterness of the offender who feels unjustly treated with no legal recourse.

The number of jurisdictions in which appellate review of the sentence is available is small but growing steadily. Courts in approximately 21 states have engaged in some review, although systematic review is limited to about 15 jurisdictions.[35] It is important to note that when appellate review is established, the presentence report takes on new importance. The report should become part of the record on appeal and thus subject to scrutiny, not only by counsel and the trial court but also by the appellate tribunal. Consideration of the quality of the report would, as a consequence, likely become a standard part of the review process.[36] Unsupported conclusions, poorly developed facts, internal inconsistencies, minimal investigation, represent the factors likely to be taken into account in assessing quality.

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[32] *See generally* ABA Project on Minimum Standards, Sentencing Alternatives and Procedures (Tent. Draft 1967). The problem of disclosure is rarely encountered in the parole process. To the extent that the grant or denial of parole is similar to judicial sentencing, however, the same reasons for disclosure exist.

[33] *See* Cohen, *Legal Norms in Corrections* 39-40 (Consultant's Paper, President's Commission on Law Enforcement and Administration of Justice, 1967).

[34] Contrast this with sentencing review procedures in the juvenile court system discussed in Chapter V.

[35] *See* Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences,* 15 Vanderbilt Law Review 671, 688-97 (1962). *See generally* ABA Project on Minimum Standards, Appellate Review of Sentences (Tent. Draft 1967).

There are a variety of options available in order to establish sentence review: a special tribunal composed of trial judges, review by existing appellate tribunals, or an administrative body with the power to recommend revision (a built-in feature of so-called administrative sentencing). Which option might be most appropriate will not concern us here.

The strain such review would impose on the probation staff is apparent. Yet the notion of *accountability,* with its accompanying pressure to develop a supportable case, should have a wholesome effect. No one has been heard to argue that presentence reports are generally so excellent, so "scientific," that they need not be scrutinized. As Justice Fortas wrote in *Kent* v. *United States,*

> If the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matter. There is no irrebutable presumption of accuracy attached to staff reports.[37]

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[36] *See* State v. Leckis, 79 N.J. Super. 479, 192 A.2d 161 (1962).

[37] 383 U.S. 541, 563 (1966).

III. CORRECTIONS AND LEGAL CHANGE: PROBATION AND PAROLE

Probation and parole are, of course, not without important distinctions.[1] Probation evolved as an alternative to imprisonment,[2] while parole evolved as an alternative to continued imprisonment. Where probation generally is administered at the local level and as a component of the judicial system, parole is generally administered at the state level and by an administrative agency that is part of the executive branch of government.[3] There are broad differences in the characteristics of probationers and parolees; probationers tend to have committed less serious offenses and exhibit fewer recidivist tendencies.

Despite these differences it is clear that probation and parole "now share precisely the same goals and use precisely the same techniques . . ."[4] Both devices pursue the goals of rehabilitation, surveillance, and economy; both assist the agencies of law enforcement, prosecution, and institutional confinement; conditions are attached to the grant of either; the community serves as the correctional arena in both; and the individual is in each case under the supervision of someone who has access to coercive authority.[5]

Since we are concerned here primarily with legal issues, and not with issues like appropriate casework supervision, caseload distribution, individual vs. group therapy—that is, correctional strategy[6]—such differences as do exist between probation and parole have little direct relevance. Indeed, as we shall see, the legal issues involved in the granting, supervision, and termination of probation and parole are virtually identical. *The legally relevant situation involves authoritative decision-makers*

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[1] This section will not give special attention to misdemeanor parole or conditional pardon.

[2] Many jurisdictions permit a defendant to be incarcerated prior to the initiation of probation supervision. *See, e.g.,* Model Penal Code, §301.1 (3) (P.O.D. 1962) which provides for a term of imprisonment not to exceed thirty days. Under classical probation theory, this practice is a contradiction in terms.

[3] *See* National Parole Institutes, A Survey of the Organization of Parole Systems (1963).

[4] New York State, Preliminary Report of the Governor's Special Committee on Criminal Offenders 35 (1968). *See also* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 60 (1967), hereafter referred to by title.

[5] The existence of these multiple and often conflicting goals will be discussed at another point. For now let it be plain that the writer is in basic disagreement with the usual rhetoric, "Probation and Parole have as their sole purpose rehabilitation of the offender." Sklar, *Law and Practice in Probation and Parole Revocation Hearings,* 55 Journal of Criminal Law, Criminology and Police Science 175, 196 (1964).

[6] Even the standard works in the field make no basic distinction on "treatment strategies." *See, e.g.,* Newman, Sourcebook on Probation, Parole and Pardons 205-331 (3d ed. 1968).

exercising a vast discretion within a broad statutory framework in the regulation of individuals who are convicted of a crime and who either desire their liberty or who seek to retain it.[7]

Dynamics and Components of Decision-Making

Probation and parole decision-making occurs within a statutory framework that characteristically is vague both as to basic objectives and specific criteria. This is true whether we refer to the supervisory process, the decision to grant or deny, or the decision to terminate. In Texas, for example, probation may be granted "when it shall appear . . . that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby." [8] Parole, on the other hand, may be awarded "only for the best interest of society."[9]

Probation decision-making, which is simply a specific aspect of sentencing, typically will be restricted by statutory exclusions relating either to the nature of the offense, the prior criminality of the offender, or the number of years assessed in the current proceedings.[10] Parole decision-making, on the other hand, is limited not only by statute but also by the leeway left after the sentencing authority has acted within legislatively defined limits. In some jurisdictions parole is prohibited for persons sentenced for specific felonies or to a life term.[11] Typically, however, eligibility is based on serving some portion of the sentence – one-third or one-half of the maximum – or on completing a minimum term, usually less good-time credits. In some jurisdictions, the offender is immediately eligible for release on parole.

Once we move beyond the basic eligibility factors and the broad policy statements like those in the Texas Code, the law becomes even more vague. Even on such a fundamental question as whether or not a violation must exist before the grant may be terminated, the absence of legislative standards has created needless conflict and confusion in the courts.[12] Before undertaking a consideration of some specific legal issues in probation and parole decision-making, it would be helpful to analyze several matters that pervade the entire subject: (1) the benevolent purpose doctrine; (2) the theories of privilege, contract, and continuing custody; and (3) distinctions between so-called sentencing (granting) decisions and termination (suspension and revocation) decisions.

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[7] Some jurisdictions permit the grant of probation without the entry of a verdict or a judgment of conviction. For an excellent discussion of this practice, *see* Skinker v. State, 239 Md. 234, 210 A.2d 716 (1965).

[8] TEXAS CODE CRIM. P. ANN. art 42.12 §3 (1966).

[9] TEXAS CODE CRIM. P. ANN. art 42.12 §15 (c) (Supp. 1968).

[10] In Texas, if the jury assesses more than ten years, the judge cannot grant probation.

[11] *See* Workman v. Kentucky, 429 S.W.2d 374 (Ky. 1968).

[12] *See, e.g.,* Kaplan v. United States, 234 F.2d 345, 347-48 (8th Cir. 1956) (Probation).

Benevolent Purpose

The earlier discussion of juvenile justice, the mentally ill, and students' rights illustrated both the use of the benevolent purpose doctrine in other areas and its susceptibility to legal challenge. The doctrine also appears in various guises and is put to a variety of uses by and on behalf of corrections. In the context of probation and parole its most fundamental use may be stated in these terms:

1. No governmental entity is required to establish a probation or parole system; and therefore, should one be established, no individual has an enforceable claim to the grant of supervised freedom.
2. When an individual is granted probation or parole, he receives more largess (or less punishment) then that to which he is entitled and therefore canot complain about the burdens of supervision or the manner in which the grant may be terminated.[13] Perhaps the most fundamental challenge to correctional decision-making processes relates to the continued reliance on the benevolent purpose doctrine.

The major correctional consequence of adherence to the doctrine can be understood best from an examination of Justice Black's observations in *Williams* v. *New York,* an important case dealing with sentencing procedures.[14] Justice Black writes, "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." [15] He concludes from this "benevolent purpose" of corrections that due process should not be treated as a device for freezing correctional procedure in the mold of trial procedures. To do so, he states, would impair correctional devices like indeterminate sentences, probation, and parole – a position warmly supported by many spokesmen for corrections.[16]

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[13] There are, of course, some problems connected with this use of the benevolent purpose doctrine. There are few activities that a government is *required* to undertake. For example, it is not clear that a government is constitutionally required to adopt a penal code or maintain a system of public education or even maintain a municipal police force. While the affirmative duties of government are few, the undertakings of government are too numerous to describe.

To determine the legitimacy of claims raised about the conduct of government programs by determining whether it is required to undertake a particular program is not only to overlook the reality of governmental activity but also to virtually mandate the answer.

[14] 337 U.S. 241 (1949). The *Williams* decision is often cited as authority for the position that there is no constitutional right to disclosure of the presentence report. Actually, it is authority for a more narrow constitutional ruling: *In the absence of a specific request to do so, due process does not require confrontation and cross-examination of persons who have supplied out-of-court information used in the determination of the sentence. See* Rubin, *Sentences Must Be Rationally Explained,* 42 F.R.D. 203, 216 n.27 (1967).

[15] 337 U.S. at 248.

The operating principle that emerges from the use of the benevolent purpose doctrine, then, is that the goals of corrections can best be obtained by the preservation of maximum discretion on the part of judicial and correctional authorities. Discretion, in turn, is maximized by the reduction or elimination of procedural "obstacles;" minimizing the role of the offender or his representative in the decision-making processes; and the maintenance of a statutory framework that is so broad that virtually any decisions can be smuggled through the mythical borders of legislative intent.

One would think, as a matter of both logic *and* sound legal-correctional policy, that precisely the opposite conclusion should flow from Justice Black's observations. That is, as those in authority are granted more power – more freedom of action over the lives of other individuals – there should be more, not less, judicial concern for procedural safeguards. One need not be steeped in the lore of correctional strategies to label inconceivable the idea that corrections would claim that a reign of absolute authority is a prerequisite for adequately inculcating offenders with noncriminal values. And, for those who are tempted to make that argument, consider Justice Douglas' admonition: "Law has reached its finest moments when it has freed men from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered." [17]

The most fundamental problem, however, with the benevolent purpose doctrine is its basis: the factual assumption that reformation and rehabilitation are important goals for corrections. It may well be that they are important *goals,* but there exists impressive evidence that they remain goals and not achievements.[18] As Sol Rubin puts it:

> Probation and parole date from the last century, and neither one has been a real success: they are promising devices, but their promise has yet to be fulfilled.
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> Despite probation and parole and despite the contribution of psychiatry and casework, the picture we have today is, with slight exception, of steady increase in

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[16] How this impairment would occur and with what consequences is not made clear. In Powell v. Texas, 392 U.S. 514, 530, Justice Marshall wrote, "This court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects. . . ."

[17] United States v. Wunderlich, 342 U.S. 98, 101 (1951) (dissenting opinion).

[18] A review of the outcome of correctional programs in 100 studies conducted between 1940 and 1959 disclosed that those studies in which the greatest care had been taken in the experimental design reported either harmful effects of treatment or, more frequently, no change at all. Bailey, *Correctional Outcome: An Evaluation of 100 Reports,* 57 JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE 57, 153-60 (1966). These findings also are reported in TASK FORCE REPORT: CORRECTIONS 12 (1967).

> the use of imprisonment, of institutions that are as large or larger than ever they were and for the most part no less secure, and of men serving terms that are ever increasing in length.[19]

The present allocation of funds and manpower for treatment purposes demonstrates a minimal commitment to the rehabilitative ideal. The national profile of corrections reveals that about 80 percent of all "correctional" costs are expended on institutions, with 14.4 percent of all costs going to probation and only 3.5 going to adult parole.[20] In a recent study of correctional personnel conducted by Louis Harris and Associates for the Joint Commission on Correctional Manpower and Training, it was found that no correctional setting receives a positive rating by a majority of the correctional personnel. There is also relatively high agreement on the low level of correctional accomplishments. The study also confirmed the low level of formal training all groups have had in corrections and criminology, and for administrators, the low level of training in business or public administration.

It may be argued that to demonstrate that corrections has been unable to achieve the goals of reformation and rehabilitation does not necessarily demonstrate that these are not the primary goals. However, it seems clear that probation and parole are concerned with other goals: goals that are neither latent, indirect, nor unintended.[21] For example, when probation is granted on condition that the probationer cooperate with the grand jury[22] or when it is systematically denied unless the accused pleads guilty, the rehabilitative ideal is far from primary.[23]

Indeed, the judge's freedom on the decision to grant probation and the conditions he may impose is such that he is able to pursue virtually any objective that suits his fancy. In some cases probation is granted in order to assist law enforcement or the prosecutor;[24] in other cases it is granted to assist local merchants in the collection of debts;[25] in still others, it is used to deter student protests or civil rights activities, to facilitate a guilty plea, or (the most common condition) provide for support of the probationer's family.[26]

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[19] Rubin, *The Model Sentencing Act*, 39 New York University Law Review 251 (1964).

[20] Task Force Report: Corrections 115-212 (1967).

[21] One writer describes probation supervision as more a process of verification of behavior than a process of modification of behavior. Diana, *What is Probation?*, 51 Journal of Criminal Law, Criminology and Police Science 189, 197 (1960).

[22] United States v. Worcester, 190 F. Supp. 548, 556 (D. Mass. 1961).

[23] United States v. Wiley, 184 F. Supp. 679, 684 (N.D. Ill. 1960). *See also* People v. Morales, 252 Cal. App. 2d 537, 544, 60 Cal. Rptr. 671, 678, *cert. denied*, 390 U.S. 1034 (1968), involving the imposition of consecutive sentences because the accused demanded a jury trial and was believed to have interposed a frivolous defense.

[24] *See* Sherman v. United States, 356 U.S. 369, 374 n.3 (1958) for an example of use of the suspended sentence as a device to create government informers. *See also* United States v. Worcester, 190 F. Supp. 548, 556 (D. Mass. 1961), in which probation was used to assist the prosecutor with other cases growing out of a massive conspiracy.

[25] *See, e.g.*, Stover v. State, 365 S.W.2d 808, 809 (Tex. Crim. App. 1963).

In parole, virtually the same situation prevails. The board's discretion is at least as broad as that of the sentencing authority and the board members' accountability just as minimal. Any differences that exist between probation and parole do not affect our general proposition; they merely reflect the fact that parole is an alternative to *continued* confinement. Thus, parole decisions may be based on the exigencies of overcrowding in the prison or, the obverse, the need to maintain a given population level in order to maintain prison industry or to justify the budget. Parole may be denied in order to enforce prison discipline or to avoid the risk of incurring criticism of the system. On the other hand, parole may be granted, despite doubts about reformation, as a reward to an informant.[27]

To sum up, probation and parole suffer alike from inadequate financing, marginal training of personnel, unmanageable caseloads, inadequate research, and inadequate and conflicting theory. It also seems clear that rehabilitation and reformation are not primary or exclusive goals; indeed, the term humanitarianism is probably more descriptive of the best of what corrections does under the label of rehabilitation.[28] Among the other goals are surveillance, economy, and direct assistance to the other agencies of criminal justice.[29] The point of all this is not to discredit probation and parole but to demonstrate the fallacy – engendered by the benevolent purpose doctrine – of drawing conclusions about the need for legal safeguards in corrections from a conceptually inaccurate description of the goals of corrections and from a factually inaccurate description of their accomplishments.[30]

Privilege, Contract, and Continuing Custody

This section deals briefly with the "holy trinity" of legal rationalizations used to deny legal claims brought by probationers and parolees.

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[26] *See generally* Best & Birzon, *Conditions of Probation: An Analysis,* 51 Georgetown Law Journal 809 (1963).

[27] *See generally* Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 Washington University Law Quarterly 243.

[28] In many jurisdictions probation and parole officers are invested with the power of peace officers. *E.g.,* Iowa Code Ann. §247.24 (Supp. 1968). In Texas, for example, it is not uncommon for probation officers to wear a pistol. Indeed, many probation officers in Texas, particularly in the more rural settings, are recruited from law enforcement agencies and continue to view themselves as law enforcement officers.

[29] Absent an agreed upon definition of rehabilitation, it is impossible to engage in any meaningful research to determine whether "it" is accomplished. *See* Sherwood, *The Testability of Correctional Goals* 42, in Research in Correctional Rehabilitation (Joint Commission on Correctional Manpower and Training, 1967).

[30] *See* discussion on page 3 *supra.*

These rationalizations have been so thoroughly discredited — although too many courts and correctional administrators seem unaware of the fact — that any extensive treatment here is not justified.[31] However, on the assumption that most readers are not lawyers and thus not familiar with the legal literature, a rather summary treatment of these matters seems appropriate.

The privilege, or act of grace, theory is a more specific way of stating one aspect of the benevolent purpose doctrine. Stated simply, the privilege theory — an inheritance from the sovereign prerogative of mercy — is used to deny the existence of any enforceable claims either to the grant, to the conditions of supervision, or to the manner of termination.[32]

A fundamental problem with this theory is that probation is now the most frequent penal disposition just as release on parole is the most frequent form of release from an institution. They bear little resemblance to episodic acts of mercy by a forgiving sovereign. A more accurate view of supervised release is that it is now an integral part of the criminal justice process and shows every sign of increasing popularity. Seen in this light, the question becomes whether legal safeguards should be provided for hundreds of thousands of individauls who daily are processed and regulated by governmental agencies. The system has come to depend on probation and parole as much as do those who are enmeshed in the system. Thus, in dealing with claims raised by offenders, we should make decisions based not on an outworn cliche but on the basis of present-day realities.[33]

The contract-consent theory, an offshoot of the privilege theory, rests on the notion that an offender is "entitled" only to the maximum prison term allowed by law, and probation or an early release from prison is characterized as a bargained-for agreement, the terms of which are subject to enforcement by the court or the board. This theory is used most often to justify the imposition of a condition that is alleged to be unconstitutional—for example, consent to search and seizure—and to justify summary revocation based on a "breach of contract."

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[31] *See, e.g.*, Kadish, *The Advocate and the Expert — Counsel in the Peno-Correctional Process*, 45 Minnesota Law Review 803 (1961); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harvard Law Review 1439 (1968); Note, *Judicial Review of Probation Conditions*, 67 Columbia Law Review 181 (1967); Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 New York University Law Review 702 (1963).

[32] The privilege theory appears in appellate decisions far more often than the contract and continuing custody theories. *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935) (probation); Ughbanks v. Armstrong, 208 U.S. 481, 487-88 (1908) (parole).

[33] Outside the area of corrections, the right-privilege dichotomy largely has given way to the doctrine of unconstitutional conditions. Under this doctrine, government cannot extend "benefits" and at the same time withhold or dilute constitutional rights. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 528-29 (1958), in which the state was prohibited from conditioning a tax exemption upon the signing of a loyalty oath. *See also* Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952), holding that constitutional protections extend to discharge of a public employee although he may have no enforceable right to employment. *See generally* Comment, *Unconstitutional Conditions: An Analysis*, 50 Georgetown Law Journal 234 (1961).

A contract is a freely bargained-for, mutually acceptable, agreement supported by a valuable consideration and arrived at by parties who possess some equivalency in bargaining power. Even if we assume that the offender has the power to refuse the grant,[34] we must recognize that he will accept virtually anything to gain his freedom.[35] The probation or parole "agreement" handed to the offender, then, bears little resemblance to a contract; realistically, it is a notice of conditions arrived at *ex parte* by the court or parole board and no more. Furthermore, it makes little sense to borrow a concept from the world of commerce and put it to work in an area which involves the regulation of liberty. The important legal problems in corrections will be better handled if the particular question involved is analyzed instead of being obscured by this type of make-weight legalism.

Despite the fact that many parole statutes state that the "prisoner at liberty shall be deemed to be in the legal custody of the board," the continuing custody theory is the most specious of the "holy trinity." [36] The premise of this theory is that a parolee is a prisoner who is not actually at liberty but who rather continues to serve his sentence within ever-expanding prison walls. It thus asserts what our senses deny.

The fact is that parole is a grant of conditional liberty and whether or not the prisoner had an enforceable legal claim to it and no matter how "conditional" it may be, he is not within an institution. Indeed, regulations that may be supportable within the prison—for example, denial of sexual access to the prisoner's wife—would be indefensible if applied to a parolee. If parole is in fact doing time behind invisible walls, how can we justify the common practice of denying credit for "street time" should the parolee be reimprisoned? If prison authorities sought to do something similar, it would clearly be the illegal imposition of an additional penalty.

The point here, as with the other theories discussed, is that we continue to rely on a false and inadequate theory to solve difficult legal questions. One might conclude that an individual who is under probation or parole supervision is and should be without substantive or procedural rights. If so, a far better theory and explanation than any reviewed here is required.

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[34] *Cf.* Biddle v. Perovich, 274 U.S. 480, 482-83 (1927).

[35] In Mansell v. Turner, 14 Utah 2d 352, 353 n.4, 384 P.2d 394, 395 n.4 (1963), the court stated that if the prisoner does not like the condition imposed—leaving the state—he can simply refuse the offer of parole. Needless to say, the writer takes a dim view of this logic, particularly when it is used to answer a challenge to the legality of banishment as a parole condition.

[36] For a discussion and citation to statutes on point, *see* Note, *Parole: A Critique of Its Legal Foundations and Conditions,* 38 NEW YORK UNIVERSITY LAW REVIEW 702, 711-20 (1963).

Sentencing and Revocation Decisions

In the current debate over appropriate procedures in the peno-correctional process, distinctions are often drawn between *sentencing-type decisions* — disposition after verdict or plea and the grant or denial of parole — and *revocation-type decisions* — suspension or revocation of probation or parole. It is argued that a sentencing-type decision is essentially diagnostic and predictive. A factual base, or "history," is necessary, but only as a prelude to a judgment about future behavior. A revocation-type decision, on the other hand, is said to be oriented toward a finding of fault or violation as a prelude to the imposition of a term of confinement. Although the two decisions are not without distinctions, the present tendency to dichotomize them has generated more confusion than clarity and has led to some unfortunate procedural consequences.[37]

The problem exists with the failure to analyze revocation-type decisions. When the term "revocation" is employed, it tends to be used and understood in its prescriptive sense; that is, it implies both that proper grounds have been established to terminate probation or parole *and,* necessarily, that the appropriate disposition of the matter is to imprison the offender. If the judge or the board were *required* to imprison whenever the authority to do so was found — and no such law has been discovered — then a revocation proceeding would indeed be limited to a determination of fault. But properly viewed, every revocation proceeding contains the basic components of a trial, however merged these components may become in practice. Namely, facts must be produced and measured against a norm of conduct — a parole or probation condition or a penal law — and a conclusion must be reached concerning whether the norm was violated; if it was, then another decision — a sentencing-type decision — must be made. In short, a revocation-type decision is not in itself dispositional, but merely includes within it the possibility of making a dispositional or sentencing-type decision.

What are some of the problems generated by the failure to make this analysis? When a revocation proceeding is equated with a sentencing proceding, as it frequently is, the need to properly acquire the authority to resentence — that is, the need to find fault — is submerged, and the appropriate disposition becomes the only focus of the proceeding. This, in turn, triggers the "no rights" thinking that has dominated correctional legal theory, at least until the recent decision in *Mempa* v. *Rhay.*[38] From this it follows that the role of legal process and the lawyer become insignificant, since sentencing is a process of diagnosis and prediction and the adversary process, it is said, hardly is appropriate.

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[37] The author first presented this analysis in Cohen, *supra* note 14, Chapter II at 27-29.

[38] 389 U.S. 128 (1967). For a discussion of *Mempa,* see text accompanying notes 14-17, Chapter II, *supra.*

On the other hand, if revocation-type proceedings are viewed exclusively as an inquiry into violation, as assertion and counter-assertion over facts and norms, then the role of legal process and the lawyer are viewed with more favor. This after all is the adversary model in its most pristine form, and the argument for trial-type proceedings and legal representation seems quite supportable.

It is analytically erroneous and operationally unsound to view a revocation-type proceeding either as though it were exclusively a search for a violation or as though it were simply a sentencing-type determination. Every proceeding that may lead to the loss of conditional liberty contains both issues, and to omit or underemphasize one perpetuates a basic error. The solution, as we shall see, requires the adoption of the procedural format that is best suited to the fair and accurate resolution of the questions both of authority to reimprison and of the appropriate disposition. That may well require a trial-type proceeding for the former and a more relaxed proceeding for the latter – but in the era of *Mempa,* not so relaxed as in the past.

Having developed three themes that lie at the heart of any considerat[illegible]gal norms and corrections, we turn now to an examination of specific issues.

The Decision to Grant Probation and Parole

Eligibility and the Right to Fair Consideration

Judicial decisions invalidating the legislative decision to exclude certain classes of offenders from eligibility for probation and parole are virtually nonexistent.[39] However, if a legislature should decide to exclude a class of persons on distinctions that have no reasonable relationship to a legitimate governmental objective – for example, redheads or Negroes – the legislation would be invalid either as a denial of equal protection or as an "unreasonable, arbitrary, and capricious" law violating the due process clause of the Fourteenth Amendment.

A more appropriate avenue of inquiry is to assume that an offender is statutorily eligible for probation or parole and then ask if he has any right to be fully and fairly considered for it. At the outset, it should be made clear that while there has been a significant increase in the volume and variety of judicial challenges to correctional decision-making, the revocation process has undergone far more challenges than the granting process.[40] In the wake of *Mempa,* there are now a few judicial decisions that deal with the granting process, but most of what is said here is based more on the author's speculations than on conclusions drawn from reported decisions.

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[39] *But see* Workman v. Kentucky, 429 S.W.2d 374 (Ky. 1968), which involved a 14-year-old convicted of rape and sentenced to life without parole. The court, in a most unique holding, found the exclusion from parole eligibility a cruel and unusual punishment.

[40] *See generally* Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response,* 14 Crime and Delinquency 1 (1968).

The right to fair consideration for probation is probably now a reality, since *Mempa* requires the presence and participation of counsel at sentencing, and the decision to grant probation is but an aspect of sentencing. Counsel's role in such proceedings undoubtedly will include the presentaion of facts with a rationale favorable to the grant of probation, and he will no doubt scrutinize and challenge the work of the probation staff in an effort to influence the disposition. The participation of counsel in these proceedings assures that they will follow an orderly procedural format, which in turn assures that a request for probation will be given fair consideration.

The issue of procedural safeguards in the parole granting or denial process — best symbolized by the issues of legal counsel and the right to a fair hearing — is among the most difficult issues we shall confront. While almost every jurisdiction provides for some type of hearing when parole eligibility is established, a recent survey of parole boards suggests that the word "interview" may be more descriptive of what actually transpires.[41] Indeed, the present parole hearing process is an excellent example of near-total discretion in operation. The parole applicant generally is not officially informed about the reasons for a denial — and consequently cannot know what he must do to prove worthy — and he is denied the usual procedural tools used to influence the decision and subsequently to challenge it.

Creative lawyers already have begun to argue for procedural rights in the parole granting process and, not unexpectedly, they are seeking a logical extension of *Mempa*. Despite several decisions to the contrary,[42]

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[41] NATIONAL PAROLE INSTITUTES, A SURVEY OF THE ORGANIZATION OF PAROLE SYSTEMS (1963).

[42] For example, in *In re Briguglio*, 55 Misc. 2d 584, 585, 285 N.Y.S.2d 883, 884 (Supreme Court 1968), the state court was asked to hold that the parole hearing required by New York law is analogous to a deferred sentencing proceeding, and since *Mempa* spoke directly to deferred sentencing, the prisoner must, by analogy, be allowed representation by counsel at the hearing. The court, however, although plainly troubled by the logic of the prisoner's argument, denied the request for counsel, relying on a supposed distinction between *giving* and *taking*. The court reasoned that when probation, and presumably parole, is to be terminated, there is a divestment of something that is possessed — freedom. In the matter of granting, it was stated, freedom already has been denied by due process and there is no additional divestment. *Id.* at 586. 285 N.Y.S.2d at 885.

In a recent federal habeas corpus action, a state prisoner, once again relying on *Mempa,* claimed that he had a right to counsel before the Adult Corrections Commission on review of his sentence to determine his possible release on parole. The court stated that "parole consideration is not a proceeding against a defendant within the meaning of constitutional guarantees." Sorenson v. Young, 282 F. Supp. 1009, 1010 (D. Minn. 1968). *See also* Mahoney v. Parole Board, 10 N. J. 269, 276, 90 A.2d 8, 13 (1952), in which the court held that there was no constitutional right to a hearing on it is difficult to escape the conclusion that the decision to grant or deny parole is indistinguishable from the judicial sentencing decision and that therefore the right to counsel mandate of *Mempa* applies.

Whether a prisoner is entitled to the assistance of an attorney in preparing for a parole hearing or a lawyer's presence at the hearing may or may not be the most significant aspect of the quest for procedural safeguards – but the issue has unparalleled symbolic value. The point is that eventually a brake must be applied to the mass processing of parole applicants, and there must be some technique to bring visibility and accountability to parole decision-making. Providing for the assistance of an attorney and insisting on a hearing, however informal, is one way to accomplish this. There are, of course, other techniques – provide for sufficient, fully trained board members,[43] adequate institutional staff and program, and effective post-release programs – but these seem quite remote. And even if such improvements occur, one continues to sense the need for someone standing outside the system, wholly identified with the parole applicant and by his presence exercising a continuing challenge on behalf of the individual client.

In the recent expansion of the constitutional right to counsel, the Supreme Court has reached decisions based on a functional analysis: Is

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the classification of prisoners despite the fact that the classification decision involved the formulation of the time for parole consideration.

Perhaps the most interesting recent decision involving the grant or denial of parole is Mastriani v. Parole Board, 95 N. J. Super. 351, 231 A.2d 236 (1967). The prisoner was given a parole hearing by the Board, and when parole was denied, he complained that the denial was unfair and based on prejudice. The prisoner requested reasons for the denial, but the Board stated that it was not obliged to do so by law and did not elect to do so as a matter of policy. When Mastriani then appealed to the courts, the Board granted him a second hearing "in the light of a new parole plan," and once again parole was denied. The prisoner, pursuing his judicial appeal, now also argued for the right to inspect the Board's records as well as for a more definite statement regarding the denial.

The court did not grant any of the prisoner's requests, but the interesting aspect of this case is the nature of the demands as a portent of the future. Relying on the outworn "parole is a matter of grace" theory, the court simply disallowed the demand for a statement of reasons, for a transcript, and for inspection of the records. It held, in effect, that the only process due the prisoner is that found in the statutes and since there was no proof that the Board failed to follow statutory requirements, the prisoner's arguments necessarily failed.

[43] Judge Skelley Wright recently urged the abolition of politically appointed and politically influenced parole boards. Instead, he would substitute a professional correctional agency. *See* Wright, *The Need for Education in the Law of Criminal Corrections,* 2 Valparaiso Law Review 84, 91-92 (1967).

there an important role for counsel at this stage of the proceedings?[44] The clearest case for counsel and a fair hearing exists where the parole decision may turn on disputed facts, perhaps a charge of prison misconduct. If the determination of misconduct is made by administrative fiat and then becomes the pivotal factor in the release decision, not allowing challenge to the earlier decision perpetuates the most arbitrary type of regime. Under such circumstances, no one should be surprised when the establishment's exhortations to lawful conduct fall on deaf ears.

Although fact disputes present the clearest case, it may be misleading to single out that situation leaving the impression that "run of the mill" decisions are not also in need of increased legal attention. In the later discussion of prisoner's rights, the question of legal services for inmates is dealt with. At this point we need only say that if legal services were systematically available to inmates, then among the services that should be provided are assistance in the preparation for parole and, in some cases, actual representation before the board.[45]

To conclude this section on an affirmative note, an outline of procedural regularity for parole hearings will be offered. At a minimum, every prisoner eligible for parole should be given a full and fair hearing. The procedures need not be formal, although in the case of fact disputes there should be a greater concern for procedural regularity. A verbatim record should be kept, and the board should be required to make written findings of fact and a brief statement supportive of its conclusion.

If the board uses a hearing panel, then the prisoner who is denied release should have an administrative appeal to the entire board. This procedure may be as simple and as expeditious as possible. For an administrative appeal, the prisoner might be given ten days to file a "notice of appeal" which, in turn, would result in the transcript being made available to the entire board. The prisoner should be requested to state the grounds for the appeal but only in the most rudimentary form. A basic premise is that all these procedures should be carefully thought out and articulated in advance.

The prisoner, of course, should have the opportunity to appear before the board in order to state his case and be subject to questions. A decision would then be rendered within a reasonable time. Access to the courts would continue to be available, but in the face of an orderly and reasonable administrative procedure, the courts may well continue their reluctance to interfere. Without some internal procedure, the courts may well see the merit of combining logic and policy to find that parole boards and sentencing judges engage in identical functions in which a judicially imposed procedural framework is a necessity.[46]

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[44] *Compare* Schmerber v. California, 384 U.S. 757 (1966) with United States v. Wade, 388 U.S. 218 (1967). Assuming that counsel has a role in the parole granting process, it is not the essentially negative role — "Don't give any statements" — he has in pre-arraignment proceedings; nor is it quite like the "shepherd's" role he has at a police lineup. We may also fairly reject the flaming oratory, embattled advocate role we tend, often unfairly, to associate with the performance of counsel in the courtroom. Counsel's role in the parole hearing would seem to be eclectic, having some of the characteristics of the "shepherd's" role and a good many of the characteristics of his role as negotiator in plea bargaining and judicial sentencing.

[45] The discussion of sentencing procedures, page 18, need not be repeated here. The similarity of judicial sentencing and parole decisions has been discussed. Thus one need only transpose the discussion of sentencing and ask: To what extent do logic and policy require an identity of procedural safeguards?

The issue of providing legal counsel is more complicated. For example, if one opts for a rule that permits retained counsel to appear before the board, the possibility of an equal protection argument lurks in the background. That is, one might argue that if attorneys appear on behalf of those prisoners who are able to afford them, then presumably they have a function to perform and the factor of indigency cannot be used to determine the exercise of so fundamental a right as legal counsel when liberty is at stake.

In the face of an equal protection challenge, the position might be taken that no attorney should be permitted to appear before the board. This "all or nothing" argument has a certain logical appeal, but somehow we rebel at the prospect of a total denial merely in pursuit of logical consistency and in the face of a shadowy constitutional argument.

A very practical solution is to encourage the use of attorneys in a limited number of jurisdictions as part of an experimental program providing a full range of legal services to inmates. A carefully designed experimental model should be developed to test the ultimate question: Does an attorney have a useful role to perform in the decision to grant or deny parole?

Parole board members have stated privately that they fear the "wheeler-dealer" attorney who takes a substantial fee and performs no substantial service.[47] There are, of course, some unscrupulous attorneys who will take advantage of clients and attempt to corrupt the system. However, it will be the responsibility of the board to control the performance of counsel, and it remains the responsibility of the bar to improve its disciplinary functions. Law schools are giving increased attention to the area of corrections, and the impact of this training should be felt in the very near future. The hope is that the additional law school training and sensitivity to the issues will create a "new breed" of attorney. But, as a prelude to a system of total availability of counsel, we must at a minimum insist on the right of a prisoner to retain counsel who may appear before the board on behalf of his client.

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[46] Probation is not mentioned at this point because everything said previously about sentencing applies directly. For a complete discussion of sentencing-probation decisions, see Cohen, *supra* note 14, Chapter II.

[47] In Chappel, *The Lawyer's Role in the Administration of Probation and Parole,* 48 AMERICAN BAR ASSOCIATION JOURNAL 742, 745 (1962) the author is very skeptical about the contribution made by counsel in correctional proceedings. Indeed, he suggests that at times the attorney does injury to the cause of his client.

Conditions

Once the decision is made to grant probation or parole, the conditions attached to the grant become the measure of the individual's freedom and responsibility. Since revocation may be based on the failure to observe a condition, the legal significance of conditions is clear. The symbolic value of the condition is that it makes clear that probation and parole are not grants of absolute freedom. The discretion to fashion conditions, the variety of conditions actually imposed, and the supervisory-enforcement discretion of the field officer are crucial issues in the consideration of additional legal safeguards in corrections.

The basic legal issues associated with probation and parole conditions may be summarized as follows:

1. Conditions often affect such basic constitutional freedoms as religion, privacy, and freedom of expression.
2. Too often they are automatically and indiscriminately applied, without any thought given to the necessities of the individual case.
3. In many instances conditions lack precision and create needless uncertainty for the supervised individual and excessive revocation leverage for those in authority.
4. Some conditions are extremely difficult, if not impossible, to comply with.

Whether one seeks guidance on basic policy or specific criteria, once again legislative direction is almost nonexistent. Some statutes list the conditions that may be imposed and include a general grant of authority to fashion other conditions, while others permit "such terms and conditions as the court deems best." [48] A proposed variation is to list specific conditions and then permit the judge or the board to fashion any other conditions reasonably related to the rehabilitation of the offender or specially related to the cause of the offense and not unduly restrictive of his liberty or incompatible with his freedom of conscience.[49]

The courts have on many occasions reviewed challenges to the legality of conditions. The standard of review most often employed is: Conditions will be upheld unless they are illegal, immoral, or impossible of performance.[50] It should be noted that the legality of the conditions in this context means, essentially, their constitutional validity. A condition that is somehow outside the scope of the governing legislation – a most unlikely occurrence, given the breadth of existing legislation – or one that is determined to be against "public policy" or "not within the legislative intent" may also be voided.

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[48] *See, e.g.,* 18 U.S.C. §3651 (Supp. 1964).

[49] MODEL PENAL CODE §§301.1 (2) (l), 305.13 (1) (j) (P.O.D. 1962). The reference to rehabilitation contained therein is limited to probation conditions.

In Mansell v. Turner, 14 Utah 2d 352, 354-55, 384 P.2d 394, 396 (1963), the concurring judge argued that there should be a relationship between the condition — banishment from Utah — and rehabilitation or the protection of society. The chief justice severely admonished his colleague for his "bold view," arguing, in effect, that if a prisoner does not like the condition, he need only reject parole. *Id.* at 353 n.4, 84 P.2d 395 n.4.

[50] *See, e.g.,* State v. Harris, 116 Kan. 387, 389, 226 P. 715, 716 (1924). In Sweeney v. United States, 353 F.2d 10, 11 (7th Cir. 1965), the court determined that it was unreasonable to impose a "no drinking" condition on a chronic alcoholic.

Any condition that is illegal is, by definition, unenforceable and may not be used either as a basis for the regulation of conduct or as a ground for revocation. The grant of probation or parole and the remaining valid conditions should be considered in full force and effect until lawfully altered.[51] A contrary view, followed in some jurisdictions, leads to the result that a successful challenge to a particular condition results in the withdrawal of the grant and the imposition of a term of imprisonment.[52] This sort of Pyrrhic victory, of course, operates to discourage the legitimate exercise of legal rights.

At this point, we should consider the question whether an offender must accept probation or parole. Although cases can be found on both sides of the issue, the more recent decisions affirm the view that the offender can reject the offer of conditional freedom.[53] Any lingering doubts concerning the power to reject the offer may be traced to the oft-cited opinion in *Biddle* v. *Perovich*,[54] where Justice Holmes took the position that a prisoner could not successfully challenge the commutation of a death sentence to a life sentence. The essential difficulty with using *Biddle* in the probation and parole area is that the case involved the exercise of executive clemency. Whatever may be the contemporary utility of executive clemency, it is an episodic and unsystematic ameliorative device and thus bears little resemblance to the modern institutions of probation and parole.

Most judicial opinions concluding that an offender is free to reject the offer of conditional freedom arise in the context of challenges to a questionable condition. By reasoning that the "offer" of the grant does not become operative until "acceptance," the courts dutifully pursue the logic of their position and uphold the challenged condition. Rather than become entangled in the niceties of an inapposite contract analogy, it seems more sensible to deal with the question in terms of the discretion of the court or the board to refuse to make the grant unless the offender indicates his willingness to abide by the proposed conditions.

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[51] *See* Tabor v. Maxwell, 175 Ohio St. 373, 376, 194 N.E.2d 856, 858 (1963).

[52] *See* Note, *Judicial Review of Probation Conditions*, 67 COLUMBIA LAW REVIEW 181, 195 (1967).

[53] *Compare* Cooper v. United States, 91 F.2d 195, 199 (5th Cir. 1937), holding that probation laws vest a discretion in the court and not the offender, with *Ex parte* Peterson, 14 Cal. 2d 82, 85, 92 P.2d 890, 891 (1939), holding that a prisoner is free to reject parole.

For recent confirmation of the right to refuse "position," *see* People v. Miller, 64 Cal. Rptr. 20, 25-26 (Cal. App. 1967) (probation); *In re* Schoengarth, 57 Cal. Rptr. 600, 604, 425 P.2d 200, 204 (1967) (parole).

[54] 274 U.S. 480 (1927).

Adherence to the strained concept of consent merely impairs our ability to deal with the real issue. All of us recognize that probation and parole involve a legal situation where the government, presumably by prior lawful procedures, has the legitimate authority to exercise some control over the liberty of an individual. While the offender should be afforded a more active role and greater procedural and substantive protections, ultimately it is those in authority and not the offender who select between a community or institutional disposition; the offer of freedom, however conditional, normally will be more attractive than the alternative. Thus our major concern should be for determining the appropriate limits on the exercise of authority, and not for a chimerical right of rejection.

Constitutional Freedoms

It should be clear beyond argument that "no civil authority has the right to require anyone to accept or reject any religious belief or to contribute any support thereto." [55] The authority for this proposition is, of course, the First Amendment. This type of condition rarely is encountered in the reported decisions; the reason, undoubtedly, is the certainty of its unenforceability.[56] However, a very real possibility is that such a condition may be imposed "informally" either by the court or the board or even the field officer. Many prisons encourage inmates to attend religious services regularly, and such attendance is viewed as evidence of "a positive approach to the prison program." To the extent that this questionable practice spills over to probation and parole it should be condemned, and care should be taken to assure that anyone with the temerity to challenge such a practice is not the object of retribution.

Increased reliance on public protest as a means to obtain social and political redress has recently resulted in the use of a probation condition that restrains the probationer from participation in future demonstrations. This type of condition has been used in such instances as the demonstrations at the University of California at Berkeley, civil rights demonstrations in Florida, and failure to register for the draft.[57] If such a condition means no more than a restriction from participation in *unlawful* political protest, then it is simply redundant. Every grant of probation and parole includes a prohibition against unlawful conduct. We must assume, then, that the condition is intended to prohibit otherwise lawful speech and assembly, and we may further assume that it will be used most often against persons who have engaged in political protest.

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[55] Jones v. Commonwealth, 185 Va. 335, 344-45 38 S.E.2d 444, 448 (1946) (a juvenile case).

[56] 2 Attorney General's Survey of Release Procedures, Probation 222-257 (1939) contains an exhaustive survey of conditions, yet makes no mention of conditions dealing with religious freedom.

[57] Note, *supra* note 52, at 202.

Unquestionably, this type of restraint on political expression could not be imposed on persons generally through the use of the criminal law.[58] The problem is whether this type of condition avoids the proscription of the First Amendment since it is imposed after conviction and incident to the grant of probation.[59]

One might argue that although political expression is a constitutionally protected activity, given the conviction and the possibility of spending time in prison – where political demonstrations are not "encouraged" – the probationer cannot complain about this condition. The contract-consent argument could also be urged in an effort to preclude a successful challenge to such a condition. But considering the obvious potential for using the condition to prevent political protest, and absent any compelling social needs, it is difficult to find a rationale to support the prior restraint of First Amendment freedoms. The late Alexander Meiklejohn held the view that certain evils that government might want to prevent must nonetheless be endured if the only way of avoiding them is by abridging freedom of speech, upon which the entire structure of our free institutions rest. Meiklejohn's view seems correct, and on that basis, this type of condition is subject to the higher law of the Constitution and is thus an impermissible restraint.[60]

It is not unusual for probation and parole to be conditioned on the waiver of Fourth Amendment rights to privacy. Conditions frequently grant the field officer "permission" to visit the offender's home or place of employment, sometimes qualified by the phrase "at a reasonable time," but never requiring the officer to obtain a search warrant. Again, the question is: Can the grant of conditional freedom be conditioned on the waiver of a fundamental constitutional right?

One way to begin to solve the problem is to ask what interest the offender has in maintaining his right to privacy. Is that interest and our assessment of its social value sufficient to override the interest of correctional officials in maintaining surveillance without the additional hurdle of obtaining a search warrant?[61]

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[58] Few probation cases actually deal with the issue. For example, in Morris v. State, 44 Ga. App. 765, 162 S.E. 879 (1932), the court avoided directly passing on a condition that the offender make no remarks against the sheriff or any other adverse witness.

[59] *See* the discussion in Note, *supra* note 52, at 203-04.

[60] Denying a judge the use of such conditions could, of course, result in arbitrary denials of probation. A judge who finds himself unable to condition probation on a restraint on political activity might deny probation altogether and instead impose a fine or term of imprisonment. If the sentencing procedures previously discussed are adopted and if a successful challenge does not result in voiding the entire grant, then one hopes that arbitrary decision-making will be minimized. However, the prospect of unjustifiable denials of probation must be faced, and a balance struck with the importance of denying judges the power to limit political protest through the use of probation. If public protest reaches the point of clear and present danger to the maintenance of public order, limited use of the condition, analogous to an injunction, during the period of the danger seems desirable.

Under the principle of requiring a reasonable relationship between the condition and the offender's past conduct, we may be able to construct a reasonable accommodation between the conflicting interests. Where the prior offense involves conduct which is not likely to be uncovered without surveillance and a search – drug offenses, gambling, carrying a concealed weapon, the production or receipt of contraband – corrections officials might properly argue that they should not be required to go to the trouble of obtaining a warrant every time they suspect the continuation of the illegal activity; under these circumstances, a condition that permits a warrantless search seems defensible. Repeated use of the condition, however, could be evidence of harassment and, if established, should be grounds for the judicial modification of the condition.

On the other hand, where the prior offense suggests no need for a continuing authority to search, the interest of corrections must give way to the overriding interest in maximizing the individual's interest in privacy. The consequence of placing some limits on the indiscriminate use of this condition is not to withdraw authority to search but merely to place the correctional officer in the same position as the law enforcement officer by requiring either a warrant or that the search be incident to an arrest.[62]

Bonds and Supervisory Fees

Conditioning eligibility for release on the financial ability to put up a bond or pay supervisory costs raises serious constitutional problems under the equal protection clause of the Fourteenth Amendment. In *Griffin* v. *Illinois,* the Court made it clear that the state cannot discriminate based on poverty either in the trial or the appellate processes.[63] Indeed, long before the resurrection of the equal protection clause, the Attorney General's Survey found that the use of bonds and supervisory fees was at least doubtful.[64] The multiple burdens already imposed on the impoverished need not be increased by practices that, in effect, allow those with resources to buy their freedom and deny it to others.[65]

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[61] Search warrants can be issued only on the basis of "probable cause," and this in turn requires something more than bare suspicion or summary conclusions. *See* Aguillar v. Texas 378 U.S. 108-114 (1964).

[62] The problems associated with searches and seizures when there is no "waiver" will be discussed in the section on Supervision. *See* United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10, 13 (S.D.N.Y. 1968), in which the court held that the Fourth Amendment by its terms extends to a parolee but reasoned that any search by a parole officer conducted in good faith is reasonable. Although the judge buttresses his opinion by reference to an agreement to search, that issue seems not to have been determinative.

See also People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964) which, in effect, denies the right of privacy to parolees by using the "what could we do with the offender in prison" approach.

[63] 351 U.S. 12, 17 (1956). *See also* Douglas v. California, 372 U.S. 353, 355 (1963).

[64] 2 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, PROBATION 225, 237 (1939).

In a case involving a related problem – whether the costs of prosecution can be imposed when sentence is suspended – the Oklahoma Court of Criminal Appeals stated:

> The purpose of granting a suspended sentence is to aid in the reformation of the prisoner and to rehabilitate him so that he may make a useful citizen. To extend the terms of the statute so as to confer authority on the court to revoke a suspended sentence upon the failure of the accused to pay costs would place an unfair burden on a poor person. It would deprive a pauper of the equal protection of our laws and punish him because of his poverty.[66]

With regard to the bond, it is obvious that this requirement does not transform a bad risk into a good risk.[67] Indeed, if experience with bail bonds is analogous, then those persons best able to meet the requirement may be the worst risks.[68] In addition, the recent experimentation in the use of release on recognizance demonstrates the invalidity of reliance on a financial deterrent to flight. These same observations apply *a fortiori* to the payment of supervisory costs as a condition precedent to probation.

Distinctions may be drawn between the mandatory and discretionary use of a bond and the payment of supervisory costs. Further, we may distinguish their use as a condition precedent and as a condition subsequent to the grant. The constitutional challenge is ameliorated in the discretionary-condition subsequent situation, particularly if the practice does not tend to exclude the poor. However, as a matter of policy, it would be an extremely rare case – perhaps a well-heeled anti-trust violator or as a condition in support cases[69] – where the use of a bond or costs is justified. The cost issue must be reassessed in the context of a correctional system that deals with an involuntary clientele and under the principle that the system is an assumed responsibility of government.[70]

Fines and Restitution: Probation

Restitution, which is among the most commonly employed conditions, is distinguishable from a fine in that restitution payments are made to the one who is aggrieved by the criminal offense for which probation is extended, while a fine is paid to the government. Restitution may be further distinguished from reparation; the former consisting of reimbursement for property that was misappropriated and the latter consisting of the measure of damages that flow from the criminal event, most often the unlawful operation of an automobile.[71]

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[65] *See generally* Attorney General's Committee, Poverty and the Administration of Criminal Justice (1963).

[66] *Ex parte* Banks, 73 Okla. Crim. 1, 5, 122 P.2d 181, 184 (1942).

[67] In Logan v. People, 138 Colo. 304, 308-09, 332 P.2d 897, 899-900 (1958), the court voided an appearance bond as a condition of probation on the premise that such a bond bore no relationship to the legitimate objectives of probation.

[68] *See generally* Freed & Wald, Bail in the United States (1964).

[69] *See, e.g.*, State v. Goins, 122 S.C. 192, 196, 115 S.E. 232, 233 (1922).

[70] *Cf.* Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 720, 388 P.2d 720, 722, 36 Cal. Rptr. 438, 440 (1964) in which the court pointed out that when the state involuntarily detains someone, either in the penal or mental health system, the basic obligation for care, support, and maintenance rests with the government.

Fines and restitutionary measures undoubtedly are appropriate sanctioning devices and actually may prove to be rehabilitative in some cases. However, in order to serve legitimate correctional ends, a fine or restitution as a condition should be reasonably related to the probationer's ability to meet the obligation. To impose a financial obligation that either cannot be met or that imposes a crippling burden is to invite noncompliance and may even encourage the commission of a new offense.[72] Indeed, a reasonably good faith effort to meet the financial obligation imposed as a condition should be a valid defense to any effort to revoke for noncompliance.[73]

The legislature should articulate criteria for the imposition of fines and restitution as conditions of probation. Restitution or reparation should be held to the following principles:

1. Payment must be limited to the party actually injured.
2. The amount cannot exceed the damage actually incurred.
3. The amount, of course, cannot exceed the probationer's ability to make the payments.[74]
4. The upper limit for a fine may not exceed the fine that might have been imposed if probation had not been granted.[75]

Procedurally, the amount of the actual loss may be established either by agreement or by an adversary proceeding — not at the whim of the court or the probation officer. If the amount of the loss has been determined in the antecedent criminal proceedings, that would be sufficient.

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[71] *See* Best & Birzon, *supra* note 26, at 826-28.

[72] *See* Donnelly, Goldstein & Schwartz, CRIMINAL LAW 377, 379 (1962), reporting "The Garcia Case — A Case Study in Multiple Jeopardy," in which the probationer committed a bank robbery after being "prodded" about his delinquency in paying a fine.

[73] *See* People v. Marx, 19 A.D.2d 577, 578, 240 N.Y.S.2d 232, 234 (1963). In United States v. Taylor, 321 F.2d 339, 341-42 (4th Cir. 1963), the Court found it an abuse of discretion to revoke probation when there has been a sincere effort to pay the fine and when the failure to pay was a result of poverty. *But see* Genet v. United States, 375 F.2d 960, 962 (10th Cir. 1967), in which revocation was upheld when the probationer was unable to support his family at the required level because he had lost his job and had no way to comply. The judge made clear that he would not have granted probation except to provide for the probationer's large family.

[74] In State v. Summers, 60 Wash. 2d [illegible], 707 375 P.2d 143, 145 (1962), the court refused to allow "restitution" to run to a former wife of the defendant who was not aggrieved by the present offense.

[75] The existing law in nearly all jurisdictions fails to express any consistent policy with respect to the use of fines. The newly revised NEW YORK PENAL LAW, §80 (1967) allows a fine in a felony case only if the offender gained money or property through the commission of the offense and limits the amount to double the proven gain.

However, if the defendant has entered a plea of guilty and the court is considering probation and restitition as a condition, the sentencing hearing is the appropriate time to establish the actual loss.[76]

Banishment

Nearly all courts that have considered the question have held that banishment (*e.g.*, return to Puerto Rico and remain there ten years)[77] as a condition of probation or parole is void.[78] The Michigan Supreme Court led the way in this area and without resort to constitutional considerations.[79] It took the highly practical view that if Michigan were to permit the "dumping" of its offenders on other states, the favor would most assuredly be returned.[80]

The use of banishment is yet another example of a supposed correctional measure being used in a punitive and – as the Michigan Court recognized – parochial fashion. The Interstate Compact for Supervision of Parolees and Probationers, adopted by all states by 1951, enables the offender to leave the state of conviction and receive supervision elsewhere.[81] The Compact recognizes the need for mobility and for a change of environment but, unlike banishment, assures the individual and the public that an offender is under supervision.

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[76] Federal law is quite specific in limiting restitution to the actual deprivation, 18 U.S.C. §3651 (1964). *See* Annot., 97 American Law Reports 2d 798 (1964).

California follows the questionable procedure of allowing the probation office to determine both the amount of the restitution and the manner of payment. *See* People v. Miller, 256 Cal. App. 2d 377, 64 Cal. Rptr. 20 (1967) which upholds a substantial increase in the amount to be paid on determination of the probation office.

[77] Bird v. State, 231 Md. 432, 437-39 190 A.2d 804, 807 (1963).

[78] People v. Blakeman, 170 Cal. App. 2d 596, 339 P.2d 202, 203 (1959); State v. Doughtie, 237 N. C. 368, 369-71 74 S.E.2d, 922, 923-24 (1953). *Contra Ex parte* Sherman, 81 Okla. Crim. 41, 42, 159 P.2d 755, 756 (1945); *Ex parte* Snyder, 81 Okla. Crim. 34, 39, 159 P.2d 752, 754 (1945).

The Utah Supreme Court, however, is an exception and recently put a unique twist on the banishment issue. The court reasoned that although a court cannot impose a banishment, the Board of Pardons could. Why? The Board is given authority to grant parole on certain conditions, but the law, typically, is silent concerning the conditions that may be imposed. Since the law is silent, the court determined that the Board's authority must be plenary thus even banishment is authorized. Mansell v. Turner, 14 Utah 2d 352, 353, 384 P.2d 394, 395 (1963).

[79] While "public policy" reasons typically are announced as the rationale for voiding the condition, there may also be constitutional issues involved. For example, banishment could be argued to be cruel and unusual punishment analogous to the "loss of citizenship" cases. *See, e.g.*, Schneider v. Rusk, 377 U.S. 163 (1964).

[80] People v. Baum, 251 Mich. 187, 189, 231 N.W. 95, 96 (1930). Banishment to an area *within* the state has been held to be illegal as a probation condition. *In re* Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (1946).

[81] Council of State Governments, Interstate Compact for Supervision of Parolees and Probationers (1951). Another very "useful" form of banishment is to delay the trial of a criminal case and to promise dismissal if the accused leaves and remains out of the jurisdiction.

In concluding this section, we should note that the problem of restricting the offender to the jurisdiction clearly is distinguishable from requiring that he leave. The former restriction obviously is justifiable as an incident to conviction and as an appropriate technique to retain jurisdiction and allow the states' correctional system to operate.

Miscellaneous Conditions and the Search for Principle

Having been left to their own devices, judges and parole boards have devised a rich variety of conditions. At times the condition is just silly — compose an essay on respect for the police;[82] at times the condition violates the individual's basic physical integrity — submit to sterilization.[83] On other occasions the condition is so vague — maintain a correct life[84] — that it cannot be intelligently followed or applied. Some conditions that appear to be irrational — remain out of the motion picture business — make more sense when the basis for the underlying conviction, performing oral copulation before a motion picture camera, is learned.[85]

All the problems associated with probation and parole conditions will not be eliminated by sensible legislation, but such legislation certainly could improve the present situation. In the effort to devise sensible legislative policy, however, care should be taken not to overreact to the parade of silly, shocking, and meaningless conditions. If probation and parole are to remain useful correctional devices, there must be enough leeway to allow the conditions imposed to be molded to the individual and the individual circumstances of each case.

The guiding principles for the needed legislation should be:

1. There must be reasonable relationship between the condition imposed and the offender's previous conduct and present condition.[86]
2. Conditions should impose the minimum deprivation of liberty and freedom of conscience.
3. They must be sufficiently specific to serve as a guide to supervision and conduct.

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[82] Such a condition was voided in Butler v. District of Columbia, 346 F.2d 798 (D.C. Cir. 1965).

[83] *In re* Hernandez, No. 76757 (Cal. Super. Ct., June 8, 1966).

[84] Morgan v. Foster, 208 Ga. 630, 632, 68 S.E.2d 583, 584 (1952).

[85] People v. Bowley, 230 Cal. App. 2d 269, 40 Cal. Rptr. 859 (1964).

[86] When an offender has consistently been in trouble at a time when he is under the influence of alcohol or drugs, it is sensible to impose a condition dealing with this problem. The automatic preclusion of drinking alcoholic beverages, or being in a place where they are sold, however, is generally a good example of no reasonable relationship and of excessive revocation leverage.

Another extreme condition is the preclusion of alcoholic consumption when the offender is known to be an alcoholic. *See* Sweeney v. United States, 353 F.2d 10, 11 (7th Cir. 1965), holding such a condition unenforceable.

4. Compliance must be possible given the emotional, physical, and economic resources of the offender.[87]
5. There must be an adequate procedural format to permit advocacy on behalf of or in opposition to the conditions, not only at the time of granting but also at revocation proceedings. Challenge of the conditions must also be permitted through appeal or through the expanded use of habeas corpus.[88]

Adherence to these principles in probation and parole would be an important first step in providing both guidance and accountability for those in authority and certainty and reasonableness for those subject to authority.

The extent to which legislation should detail certain specific conditions is the final point to be discussed. The standard conditions – that the offender report regularly, remain within the jurisdiction, and commit no new offense – pose no real problems and might conveniently be set out in the legislation. The problem exists with detailing other conditions and thus inviting their automatic application. Even such regularly used conditions as "carry no weapons" or "do not consort with disreputable persons" would seem to require individualized application and greater clarity.

On the other hand, if the legislation remains at a fairly abstract level, the newly increased opportunities for judicial and administrative appeals invites a case-by-case review of particular conditions. Administrative considerations aside, case-by-case elucidation is not necessarily a negative prospect. Additional principles and further guidance are likely to emerge in the crucible of challenge and counterchallenge; since there is a paucity of authority in this area, it might be well to encourage review, at least for the short run.

Supervision and the Absence of Conditions

A legislative scheme along the lines of our earlier discussion would greatly aid the court or the board in fashioning conditions, but the task of individualizing and then applying particular conditions remains. Although that task will be aided by a procedural scheme that allows for advocacy and challenge, some situations of concern to those in authority are likely not to be directly covered by either the legislative guidelines or the conditions actually imposed. Indeed, no one seriously argues for legal rules that purport to encompass all interaction between the agents of correction and those in their charge. Having spoken to the question of authority and principle in the imposition of conditions, what remains is a discussion of the supervisory officer's day-to-day power to modify specific conditions, and of the permissible limits of his authority to supervise in the absence of such conditions.

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[87] Economic conditions – fines, restitution, and reparation – should be further limited and perhaps applied in a special category of cases in which their imposition would be meaningful.

[88] This procedure is designed to overcome the position taken in some jurisdictions that probation orders are not appealable and that an effort to appeal is, in effect, a refusal of probation. Implicit in this principle are the presumptions that a probation or parole order is a "final judgment" for appellate purposes, that there is standing to appeal, and that, if successful, the appellant will not be punished by a subsequent revocation.

The stated conditions define both the limits of authority and the duty of compliance in the area of behavior covered.[89] But absent a valid condition on point, may a correctional officer conduct a search at will, restrict First Amendment freedoms relating to free speech and assembly,[90] require the supervisee to relinquish the privilege against self-incrimination? A brief discussion of these issues is undertaken not because it is possible to present a summary of existing law — there is practically none — but so that at the level of fundamental constitutional rights we may better understand the implications of conditional freedom and provide some direction for future decision-making.

Where a sensible legislative and procedural scheme exists, then the failure to include a condition that deals with First, Fourth, or Fifth Amendment rights should be regarded as evidence that the condition has been considered and determined to be either *ultra vires* or inapplicable.[91] Linked with this proposition is the suggestion that the probationer or parolee must be regarded as having retained all of the rights and obligations of citizenship that have not been lost by virtue of provisions in the Constitution,[92] statutes, and, of course, valid conditions.[93]

Absent a valid condition dealing with search and seizure, it is difficult to understand why correctional officers should be in a different position than law enforcement officers. A search and seizure by a correctional officer is not an abstract event; it is conducted to obtain evidence of violation that may be used to terminate the grant. As such, it is analytically indistinguishable from the efforts of law enforcement to obtain evidence that may be used as a basis for conviction and the imposition of penal sanctions. Only if we determine that the nature of the underlying conviction justifies dissolving the protection of the Fourth Amendment can we reach a contrary conclusion.[94]

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[89] In Cross v. Huff, 208 Ga. 392, 396-97 67 S.E.2d 124, 127 (1951), the court held that when the order of probation was incomprehensible because of ambiguity, no basis for revocation existed. *See also* Lester v. Foster, 207 Ga. 596, 599, 63 S.E.2d 402, 403 (1951), in which the court posits due process as the basis for requiring explicit conditions and proof of their violation as a basis for revocation.

[90] *See* Roberts v. Peppersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied,* 389 U.S. 877 (1967), for a discussion of the restrictions on free speech while in prison.

[91] If a record is kept and findings are recorded, then no speculation would be necessary.

[92] U.S. CONSTITUTION, AMENDMENT XIII, §1 declares, "Neither slavery nor involuntary servitude; except as punishment for crime whereof the party shall have been truly convicted, shall exist. . . ."

[93] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

With some 800,000 persons under probation or parole supervision at any one time, the human dimensions of the issue become clear. In response to the insistent demands of a few of these individuals, three distinct lines of judicial reasoning on this issue are in the early stages of development:

1. There is no protection afforded a probationer or parolee whether the evidence taken is used at a new trial or at a revocation proceeding.
2. The Fourth Amendment protects the individual under supervision, but only where the evidence is sought to be used at a new trial.
3. The individual is protected both at a new trial and at a revocation proceeding.[95]

The Supreme Court made it plain in *Mapp* that it imposed the exclusionary rule on the states because it was deemed the only effective deterrent against lawless police action.[96] Is it desirable to seek to impose a similar deterrent on corrections? The answer would appear to be yes.

While an individual who is placed under supervision in the community concededly does not — and often should not — enjoy all the freedoms of ordinary citizens, our earlier discussions have attempted to establish a principle of imposing on offenders only those deprivations that are consistent with a valid correctional objective and that relate to the offender's prior conduct and present condition. An effort was made to establish that the imposition of some conditions — *i.e.,* requiring observance of religious practices — is beyond the power of the state, regardless of any prospects for successful rehabilitation. As Justice Frankfurter put it, the security of one's privacy against arbitrary intrusion by the police is basic to a free society and implicit in the concept of ordered liberty.

The right of privacy is so basic to our society that it is found not only in the Fourth Amendment but is an aspect of the First, Third, and Fifth Amendments.[97] By now it must be clear that we confront a value choice, and the writer opts for the insulation of probationers and parolees against arbitrary intrusions. In order to deter such intrusions any evidence of misconduct that is obtained without a warrant, not incident to a lawful arrest or not under a permissible condition, must be excluded at any new trial and, by a parity of reasoning, at any further proceedings involving the possible termination of the grant. It must also follow that a refusal to consent or cooperate with an illegal search cannot be made the basis for revocation. Obviously, such a proposal increases the risk of undetected violations as well as the burden on field officers. The judgment is that the value of privacy, of personal autonomy while in the community, more than offsets the possible risks.

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[94] The scope of the Fourth Amendment recently has been extended to inspections of residential dwellings, Camara v. Municipal Court, 387 U.S. 523, 528-534 (1967), and inspection of commercial structures, See v. City of Seattle, 387 U.S. 541 542-46 (1967). In neither situation is *liberty* necessarily at stake as it may always be in our situation.

[95] For a thorough discussion of these issues, *see* People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964). The following cases should also be consulted: United States v. Lewis, 274 F. Supp. 184 (S.D.N.Y. 1967); People v. Villareal, 262 Cal. App. 2d 442, 68 Cal. Rptr. 610, (1968); People v. Langella, 41 Misc. 2d 65, 244 N.Y.S.2d 802 (1963).

[96] Linkletter v. Walker, 381 U.S. 618, 637 (1965).

[97] Griswold v. Connecticut, 381 U.S. 479, 481-484 (1965)

It must be stressed that such an approach does not eliminate visits or searches but merely requires that before a search is made the field officer must have probable cause to believe that a new crime or a violation has been committed. The facts upon which he bases that belief should be tested before some neutral and detached magistrate.

Having previously concluded that the use of an express condition to restrict First Amendment rights should be outside the scope of judicial or adminstrative power, it must necessarily follow that the field officer has no discretion to restrict those rights. The difficulty is not so much with explicit restrictions — they appear to be rare and, as previously noted, are most often used by courts to deter unpopular political activities — as with the "gentle hint" that certain political activities are viewed as evidence of a "failure to adjust." For the relatively few individuals to whom such a provision would matter, it must be made absolutely clear that their First Amendment rights remain intact.[98]

Whether or not a probationer or parolee is protected by the Fifth Amendment's bar against self-incrimination is a fascinating question. Another way to phrase the question is to ask to what extent can a probationer or parolee be required to assist in a subsequent prosecution or revocation proceeding and to what extent must he be provided with *Miranda*-type protections?

Many, perhaps most, revocation proceedings grow out of an arrest for a new offense.[99] While the probationer or parolee is held in jail, the sheriff's office will notify the field officer who, in turn, normally will place a "hold" on the prisoner. The hold is designed to accomplish two related objectives: deny the individual the opportunity to make bail and provide the field officer with a convenient opportunity for interrogation.[100] It is in this fairly typical situation that the question of the application of *Miranda* must be confronted.

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[98] A fascinating case in point involves Leroy Eldridge Cleaver, the Black Panther leader. Cleaver successfully challenged the effort to cancel his parole by showing that it was his political activity and not any violation which triggered the revocation process. *See In re* Cleaver, No. 5631 (California Superior Court, June 11, 1968).

[99] Much of the descriptive data in the discussion that follows is based on extensive interviews with correctional personnel in the Seattle district office of the Washington Board of Prison Terms and Parole. The cooperation of Mr. William Young, District Supervisor, and his entire staff is gratefully acknowledged.

It seems reasonably clear that an in-custody interrogation by a correctional officer which produces inculpatory or exculpatory statements where no appropriate warnings or opportunity to consult with counsel are given cannot be used in any subsequent criminal proceedings.[101] Is there any valid reason why such information might be used in a revocation proceeding?

The question can be stated more generally: to what extent must the procedural protections on the road to possible revocation parallel those on the road to conviction? The correctional officer normally is in a much better position to elicit information than a police officer. He deals with an individual with whom he has established some sort of relationship, and he is able to use the in-custody interrogation in such a way that "I only want to help you" sounds credible. The person under supervision can easily be convinced that failure to cooperate is indicative of a "poor adjustment" and that silence may be converted into grounds for revocation.

As a matter of sound policy, correctional personnel should inform the suspect that he has a right to remain silent, that anything he says might be used in a revocation proceeding, and that *his silence will not be used as a basis for revocation.*[102] This approach, of course, does not rule out a revocation based on the conduct that led to the arrest; it simply requires that those in authority prove the violation by evidence that is not forced from the individual or secured on the basis of ignorance of the right to remain silent.

The Decision To Revoke Probation and Parole

This is the area in which there exists the greatest tension between legal norms and correctional practices. There are almost as many cases dealing with revocation as with all other areas of the correctional process. Wherever there is agitation for reform, there tends to be basic agreement on the need to improve the revocation process. There is, however, considerable disagreement on the specific changes required and on whether those changes should result from court decisions, comprehensive or permissive legislation, or administrative rules.

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[100] Use of the "hold" to deny bail was questioned by the majority of field officers interviewed. At this time, Seattle attorneys successfully use the writ of habeas corpus to obtain release or the setting of reasonable bail. Should pretrial or prerevocation release become common, however, the officers realize that they face serious problems in obtaining the necessary facts to determine whether or not to take action based on the arrest.

[101] Whether or not the interrogator has statutory law enforcement authority is not significant since in these circumstances the correctional officer would be acting as an agent for law enforcement. *See, e.g.,* Sherman v. United States, 356 U.S. 369, 373-75 (1958), an entrapment case, in which the actions of an unpaid informer were held attributable to the government.

[102] *Cf.* Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967), in which the Court held that police officers could not be removed from their jobs if they invoked the privilege against self-incrimination during an investigation into the fixing of traffic tickets.

The tendency to analyze incorrectly revocation-type decisions and to confuse sentencing- with revocation-type decisions already has been discussed. Our use of the term revocation refers to the formal termination of a grant of conditional freedom and the imposition, execution, or reinstatement of a term of imprisonment. Used in this fashion, revocation becomes a shorthand term for both the process of establishing authority and the decision to impose or order the execution of a term of imprisonment.[103] In the discussion of appropriate revocation procedures, the reference is to any proceeding that may result in imprisonment even though the court or agency actually imposes measures short of imprisonment.[104]

The central issues in the revocation process are *the right to counsel* and *the right to a fair hearing*. As was demonstrated earlier, the existing law on revocation procedures reveals a total lack of uniformity and ranges from fairly comprehensive treatment to silence.[105] There is, of course, great variation on the availability of counsel and the right to a hearing.

In *Mempa* v. *Rhay*[106] the Supreme Court determined that a state probationer was constitutionally entitled to counsel "at this proceeding whether it be labeled a revocation of probation or a deferred sentencing."[107] Although there was some confusion on the point, the Court dealt with the case as though the imposition of sentence had been deferred. This is an important point because subsequent decisions that seek to limit the potential impact of *Mempa* seize on this fact and determine that the right to counsel exists only where the revoking authority must determine and impose the original sentence.[108]

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[103] Where the court has imposed sentence and then suspended its execution and granted probation, the resentencing discretion of the revoking authority is identical with the discretion exercised by a parole board.

Because some jurisdictions allow revocation of probation by the parole board, particularly if sentence has been imposed, revoking authority is the more accurate term. *See* the discussion in John v. State, 160 N.W.2d 37, 43 (N. D. 1968).

[104] The process by which liberty once extended may be taken away provides an excellent opportunity to demonstrate the interrelatedness of all the issues previously discussed. Take, for example, the question of whether a violation must be proved before there exists authority to resentence and imprison. Unless a violation – either a new offense or the breach of a non-penal condition – must be proved, then our concern about the need for a guiding principle about specificity in conditions should be reduced. If probation and parole were primarily, if not exclusively, concerned with rehabilitation, then a determination of "failure to adjust" or "failure to maximize treatment" opportunities, while difficult to prove, would be consistent with the basic objective and thus serve as an adequate basis for revocation. Having previously demonstrated the multiplicity of goals that are inherent in and actually pursued by corrections, there must be considerable doubt about the invocation of the clinical model at the point of termination when non-rehabilitative objectives have been applied in granting and supervising the conditional freedom.

[105] For a fairly detailed treatment of parole revocation procedures, *see* Shelton v. United States Parole Board, 388 F.2d 567 (D. C. Cir. 1967); Hyser v. Reed, 318 F.2d 225 (D. C. Cir. 1963).

[106] 389 U.S. 128 (1967).

This clearly is an unduly restrictive reading of *Mempa*. If a distinction is sought to be made, it should not be on the basis of whether the imposition or the execution of sentence was suspended but rather on the amount of sentencing discretion possessed by the revoking authority. One might argue that once the power exists to imprison, and imprisonment is imposed, there is no point to a hearing and the presence of counsel unless the sentencing authority has some choice on the term of years. While there is a ring of credibility to this argument, *Mempa* itself undercuts its acceptability. Under Washington law, where *Mempa* originated, the court is required to fix the maximum prison term of a sentence, and the Board of Prison Terms and Paroles then sets the duration of confinement.[109] Ironically, the Board has more sentencing discretion than the court, and pursuing the logic of their own position should disquiet those who seek to restrict *Mempa* on the basis of sentencing discretion.

Curiously, *Mempa* makes no specific mention of the right to a hearing in a probation revocation proceeding. In order to decide if the states were required to appoint counsel, the Court first had to characterize probation revocation as a critical stage in the criminal process. The marriage of right-to-counsel and "critical stage" is largely based on the assumption that counsel has a meaningful function to perform. Presumably, that function is something more than chatting with the judge or the probationer after a revocation decision has been made. Unless counsel is afforded an opportunity to affect the course and outcome of the proceeding, it is difficult to conceive what it is he is supposed to do.

The format for an effective performance by counsel is a hearing, thus it seems plain that *Mempa's* express requirement of counsel carries with it an implied right to a fair revocation hearing.[110] If this interpretation is correct, then *Mempa* overturned an earlier decision, *Escoe* v. *Zerbst*,[111] and without the courtesy of even a footnote reference.

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[107] *Id.* at 137.

[108] *See, e.g.,* Rose v. Haskins, 388 F.2d 91, 97 (6th Cir.), *cert. denied,* 392 U. S. 946 (1968); John v. State, 160 N.W.2d 37, 43-44 (N.D. 1968).

[109] WASH. REV. CODE ANN. §§ 9.95.010, - .040 (1961).

[110] There are at least seven jurisdictions that have denied the right to a revocation hearing – three by statute (Iowa, Missouri, and Oklahoma) and four by judicial decision (Arizona, California, District of Columbia, and South Dakota). *See* Sklar, *supra* note 5, at 175.

[111] 295 U. S. 490 (1935).

Escoe v. Zerbst: The Right to A Hearing in Probation Revocation

Escoe is an important decision and deserves comment here. *Escoe* involved an interpretation of the federal probation law, which then required that, prior to revocation, a probationer "shall forthwith be taken before the court."[112] The probationer had been arrested as a violator; shortly thereafter the federal judge signed an order of revocation, and the probationer was on his way to Leavenworth. By a writ of habeas corpus he then complained that he was entitled to a revocation hearing both under the statute and as a matter of constitutional law.

Justice Cardozo's opinion stated flatly that the statute was mandatory and had inexcusably been violated. The Justice, however, went further and embellished his opinion with what has been termed "a most pernicious dictum":

> Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.[113]

It is this dictum, that there is no constitutional right to a probation revocation hearing, which *Mempa* appears to have abandoned.

Cardozo's rationale for interpreting the statutory language of "shall forthwith be taken before the court" to mean a mandatory hearing is likely to survive his dictum.[114] The Justice stated that the objective of an appearance before the court must be to enable an accused probationer to explain away the accusation.[115] Although this does not mean a trial in any formal sense, "it does mean . . . an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."[116]

With counsel and a fair hearing viewed as constitutional rights, Cardozo's rationale can provide the broad outline for the requisite hearing: an inquiry that is suited to the occasion and thus one that necessarily will vary. If, for example, facts are in dispute, then a trial-type proceeding – one that includes the summoning of witnesses, the right of confrontation, and cross-examination – is in order. Should counsel and the probationer agree to enter a "plea of violation," then all that is needed is a sentencing-type hearing.

The "judicializing" of probation revocation procedures is not likely to be regarded by corrections as a serious threat. But should the same inroads be made into parole revocation procedures — and that seems inevitable — acquiesence is likely to give way to howls of protest.

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[112] Act of March 4, 1925, ch. 521, §2, 43 Stat. 1260. The recently amended FED. R. CRIM. P. 32 (f), in effect, codifies the holding in *Escoe*.

[113] 295 U.S. at 492-93.

[114] In Green v. McElroy, 360 U. S. 474, 506-08 (1959), involving the revocation of a security clearance of an employee of a private corporation, the Court held that the employee had a right to confrontation and cross-examination.

[115] 295 U. S. at 493. In Hyser v. Reed, 318 F.2d 225, 237 (D. C. Cir. 1963), Judge Burger wrote, "we do not have pursuer and quarry but a relationship partaking of *parens patriae*."

[116] 295 U. S. at 493.

For probation officers, the regular use of a hearing and the regular appearance of counsel may produce unanticipated, positive side effects. The roles played by the various participants should be sharpened and clarified. Probation officers need not, and inded should not, play the roles of prosecutor, defense attorney, and chief witness. Their role should be limited to the presentation of facts within their personal knowledge on the question of violation and to the presentation of dispositional alternatives on the question of the appropriate sentence. Where prosecutors have not regularly appeared, it is important that they now do so. One of the inevitable consequences of the extension of the right to counsel to one litigant is counsel's appearance thereafter on the other side.

The "Difference" Between Parole Revocation and Probation Revocation

Although efforts are made to do so, it seems impossible to satisfactorily distinguish parole revocation from probation revocation.[117] As a New York court put it: that the sentence cannot be altered, that parole can be viewed as no part of the criminal proceedings, creates no vital differences on the question of the right to counsel. When one disposes of all the legal niceties, parole revocation involves the question of liberty or imprisonment. *Gault* and *Mempa* combine to make the right to counsel applicable at parole proceedings.[118]

In *Rose* v. *Haskins*, a majority of the court of appeals for the sixth circuit took a different approach.[119] Rose, a state prisoner, brought habeas corpus in the federal courts and argued that his right to due process under the Fourteenth Amendment was violated when, without a hearing, the parole board declared him a violator.

Rose had asked to be tried for the new offense, child molesting, but the prosecutor took no action. Ohio law required no hearing on revocation and still insulates the parole board to such a degree that it is doubtful if any remedy exists by which to challenge parole revocation.[120] The eclectic majority opinion borrowed from all the theories used to deny procedural rights to a parolee. First, the opinion seemed enamoured of the privilege theory, arguing that Ohio did not have to create a parole system; thus if it chose to do so, it might stipulate its own terms and conditions.[121] Ultimately, however, the court fixed on a version of the continuing custody theory, as announced in *In re Varner*.[122] *Varner* likened the parolee to a "trusty" who may be allowed temporarily to leave the confines of the institution but who obviously remains within the custody and control of the head of the institution.

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[117] *See, e.g.*, Hutchinson v. Patterson, 267 F. Supp. 433, 434-35 (D. Colo. 1967) (denying an alleged parole violator, *inter alia*, the right to an adequate hearing); Johnson v. Wainwright, 208 So. 2d 505 (Fla. App. 1968) (no right to counsel at parole revocation proceeding). In the former case, the judge thought the law might change after *Mempa*, but was unwilling to do it.

[118] People *ex rel.* Combs v. LaVallee, 29 A.D.2d 128, 130-31, 286 N.Y.S.2d 600, 603 (1968). It should be noted that New York law required a hearing before a "parole court," thus this court did not have to begin with the hearing question.

[119] 388 F.2d 91 (6th Cir. 1968).

[120] Revocation decisions are not reviewable by habeas corpus, mandamus, prohibition, or certiorari. It is not clear, however, whether appeal is available. 388 F.2d at 98, n.1 (dissenting opinion).

What apparently escaped their attention is the fact that the liberty of a "trusty," indeed even a prisoner on work-release, not only is conditional but is granted for a limited time and as an aspect of the institutional program. A "trusty," like any other prisoner, is reducing the time left on his sentence every day he remains in that status. Indeed, in most jurisdictions he is earning the maximum good-time credits allowed by law. Parole, on the other hand, is an indefinite grant of liberty and separates the parolee physically and pragmatically from the releasing institution. The parolee generally is neither reducing his sentence nor earning "on-the-street" good-time credits.

Of particular interest is the majority's treatment of the well-known decision in *Fleenor* v. *Hammond*,[123] which held that a conditional pardon issued by the governor of Kentucky could not be revoked without a hearing. The hearing was held to be required by the due process clause of the Fourteenth Amendment. The majority distinguished the situation in *Rose* from that in *Fleenor* on the highly questionable ground that Kentucky had no rules governing the issuance of conditional pardons and that, in any event, the pardon vested rights in the prisoner that could not be divested without a hearing.[124] The majority opinion rejects not only the analogy between conditional pardon and parole but also the analogy between proabtion and parole suggested by *Mempa*. The opinion rather casually brushes off *Mempa*, reading it as a ruling that applies only at deferred sentencing.[125]

Judge Celebrezze, former Secretary of Health, Education, and Welfare, writes a sparkling dissent,[126] an opinion that is likely to serve as a model for those courts that are desirous of finding a constitutional right to a hearing. He gives short shrift to the theories of privilege, contract-consent, and continuing custody and emphasizes that parole is an integral part of the criminal justice system. He views the grant, in effect, as a promise of continued freedom provided there is conformity with specified conditions. Revocation, he suggests, rests on a determination that there has been a violation, and that determination cannot fairly be made without a hearing.

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[121] 388 F.2d at 93.

[122] 166 Ohio St. 340, 346-48, 142 N.E.2d 846, 850-51 (1957).

[123] 116 F.2d 982 (6th Cir. 1941).

[124] Because the *Fleenor* court analogized revocation with probation, if the rights referred to by the majority concern restoration of civil rights following a full pardon, the majority simply has misread *Fleenor*. The interesting point is that while *Fleenor* may be correctly decided, the court commited a fundamental error in reaching its conclusion. The *Fleenor* court took a quotation from *Escoe* dealing with the necessity for a hearing as a matter of *statutory construction* and used it in support of a conclusion that due process required a revocation hearing. As we have noted, *Escoe* rejected the argument that a probation revocation hearing was constiutional.

[125] 388 F.2d at 97.

[126] *Id.* at 99 (dissenting opinion).

Judge Celebrezze does not make the mistake of confusing the procedural problems associated with a decision to grant or deny parole with the problems associated with termination. He concedes an extremely broad discretion in the decision to grant or deny but cogently argues that a different legal situation is created once freedom is extended.[127]

Fears that judicial interference will disrupt the whole revocation scheme are dismissed as supported by nothing more than the untutored intuition of the person expressing them. He reviews all of the commonly expressed fears:

1. Parole boards would become bogged down in needless procedure.
2. Parole boards would become unduly conservative for fear of not being able to expeditiously arrange for reimprisonment.
3. Informers would be reluctant to testify if subjected to confrontation and cross-examination.
4. The increase in cost would make the program prohibitive.[128]

These arguments are either rebutted or considered too slight to be determinative of due process safeguards when liberty is at stake.

The Right to Counsel and A Fair Hearing in Parole Revocation Proceedings

As one might expect, the number of jurisdictions that permit the revocation of parole without a hearing exceeds those that permit the revocation of probation without a hearing.[129] Many jurisdictions will not even permit retained counsel to appear on behalf of the parolee; the right to appointed counsel is almost unheard-of.[130]

The Model Penal Code adopts a format for parole revocation proceedings that goes a long way — although not far enough — toward protection against bureaucratic arbitrariness.[131] The Code requires:

1. A hearing within 60 days of return to the institution as a suspected violator;

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[127] *Id.*

[128] *Id.* at 101-02.

[129] There are about 16 jurisdictions that allow parole to be revoked without a hearing. Even where not required, however, hearings may be held in the discretion of the board. *See* Sklar, *supra* note 5, at 175; Annot., 29 AMERICAN LAW REPORTS 2d 1074 (1953).

[130] *See* TASK FORCE REPORT: CORRECTIONS 87 (1967).

[131] MODEL PENAL CODE §305.15 (P.O.D. 1962).

2. Notice of the charges filed;
3. A verbatim record of the proceedings;
4. A requirement that the decision be based on substantial evidence; and
5. An opportunity to advise with the parolee's own legal counsel in advance of the hearing.[132]

There are many gaps in the Code's coverage of the revocation process, and some of the policy positions no longer seem supportable. The failure to speak to such issues as the situs of hearings and advice concerning the right to remain silent and to detail specific attributes of the hearing process are examples of important gaps. The denial of the right to counsel and the allowance of revocation for "conduct indicating a substantial risk that the parolee will commit another crime"[133] represent questionable policy positions. Nevertheless, adoption of the Model Penal Code's provisions, adding the right to counsel, would make a substantial improvement in the procedures of most jurisdictions.

The right-to-counsel problem has been challenging even for the more sophisticated courts. One of the most important recent cases involving counsel and other parole revocation issues is *Hyser* v. *Reed.*[134] *Hyser* continued a process of interpretation of federal law that gives a modicum of procedural protection to federal parolees and mandatory releasees.[135]

The appellants in *Hyser* claimed that they were entitled to a hearing before the Board and (1) appointed counsel; (2) specification of charges; (3) confrontation and cross-examination of the Board's informants; (4) the right to examine reports deemed confidential; (5) compulsory process to obtain witnesses; and (6) a hearing held in the district where the alleged violation is said to have occurred.

The District of Columbia Court of Appeals previously had construed the statutory language of "opportunity to appear before the Board" to allow parolees to be represented by retained counsel and to present voluntary witnesses. In the present case, petitioner's claims were based on, *inter alia,* the Sixth Amendment and the due process clause of the Fifth Amendment. The court held those amendments inapplicable to the actions of the Board.[136] The court did, however, broaden the "statutory" protections to require that:

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[132] The Code is more solicitous of the probationer than the parolee. The probationer has been extended the right to be represented by counsel. *Id.* at § 301.4.

[133] *Id.* at § 305.15 (2) (b) (ii).

[134] 318 F.2d 225 (D.C. Cir. 1963).

[135] The mandatory releasee — one who must be released under supervision for the period of his earned good-time credits minus 180 days — and the parolee are generally treated alike by the federal courts. *See, e.g.,* Shelton v. United States Parole Board, 388 F.2d 567, 570-71 (D.C. Cir. 1967).

1. The arrest warrant should reveal with reasonable specificity the reasons why revocation is sought.
2. The preliminary interview must be conducted at or reasonably near the place of the alleged violation.
3. It must be held as promptly as is convenient after the arrest.

The field officer or board member who conducts this informal preliminary inquiry is required to hear voluntary witnesses and record a summary or digest of their statements. Additional information also may be tendered to the Board before any final action is taken.[137]

Mempa and its Aftermath

Returning to the basic issues of a hearing and the right to counsel, it should be reiterated that it seems impossible analytically to distinguish probation and parole revocation proceedings to the extent of requiring counsel and a hearing at one and denying it at another. The decision in *Mempa* may prove to be the springboard for procedural reform although the lower court decisions interpreting *Mempa* indicate either that its implications are not understood or perhaps are understood too well.

Mempa has returned to the State of Washington with a vengeance. A superior court judge recently granted a writ of habeas corpus to a prisoner who, it was held, was denied due process in the revocation of parole.[138] The judge determined that there are no substantial differences between probation and parole revocations, and, given a statute that provides for a hearing, he resorted to due process to determine how the hearing should be conducted. The court held that there is a right of access to the violation report and a right to confront and cross-examine witnesses. The court further held that the hearing must be near the place of the alleged violation in order to facilitate the voluntary appearance of witnesses, that counsel must be appointed, and that there must be a neutral evaluation of the reasons for arrest.

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[136] The protection of the Sixth Amendment was not explicitly urged on the court, but the majority opinion made it plain "that we would not accept the contention." 318 F.2d at 237. The reason offered is that the amendment applies only to "criminal prosecutions." Now that *Mempa* and *Gault* have elasticized the concept of "criminal prosecution," the coverage of the Sixth Amendment must be considered open to further development.

[137] *Id.* at 245. In a separate opinion, Chief Judge Bazelon announced that in a controverted case he would require confrontation and cross-examination, inspection of the records, and the appointment of counsel. In addition, because, to his mind, poverty bears no more relation to parole violation than to guilt, he saw a lack of "equal protection" in the practice of allowing only those with money to appear with counsel. *Id.*, at 248-57 (concurring and dissenting). *See* State v. Hoffman, 404 P.2d 644 (Alaska 1965) in which the court used an equal-protection rationale to require appointed counsel in probation revocation proceedings.

[138] *In re* Bailey. No. 57125 (Wash. Super. Ct., May 22, 1968).

While this judicial development is extremely noteworthy, the recommendations for new legislation prepared by the Washington Board of Prison Terms and Paroles is even more exciting. The proposed revisions go beyond the lower court's requirements in some respects and in others are a bit more restrictive:[139]

a) Conducting the parole revocation hearing at a place reasonably near where the alleged violation of parole occurs;
b) Providing the parolee with proper and timely notice of the alleged vioaltion of the conditions of parole;
c) Providing subpoena power to the Board in order that compulsory attendance of witnesses on behalf of the parolee is available;
d) Providing opportunity for cross-examination and confrontation of witnesses alleging violations of the conditions of parole;
e) Appointing attorneys at state expense for indigent parolees accused of violations of the conditions of parole;
f) Providing that the hearings will be recorded and transcripts be made available only in case of appeal;
g) Providing that no part of the testimony taken in the parole revocation hearing be used in further criminal prosecutions against the parolee;
h) Requiring that the parolee answer questions and that if he refuses to answer that in itself is considered sufficient reason for the revocation of parole.[140]

This action suggests that correctional agencies can take the initiative and further that they realize that a comprehensive legislative scheme is far more desirable than time-consuming court battles that inevitably produce *ad hoc* and perhaps unduly restrictive results.

Rights of A Probationer or Parolee Who Has Been Convicted of a New Crime

The important situation where the probationer or parolee has been convicted of a new crime has not yet been mentioned. A final conviction of a new crime logically may serve as the requisite authority for making the resentencing decision. The proceedings underlying the conviction presumably were replete with more procedural formalities and determined by a more stringent standard than any proposed for revocation.[141]

Let it be clear, however, that the fact of conviction does not obviate the need for a hearing and counsel; it only alters the decisions to be made.

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[139] The recommendations make no provision for access to the Board's files but do provide for compulsory attendance of witnesses.

[140] Sections (g) and (h) clearly recognize the applicability of some version of the privilege against self-incrimination. Section (g) resembles an "immunity" law and where a person under interrogation is granted immunity from prosecution, he traditionally has been required to testify on pain of being held in contempt. The question here is whether silence can be used to revoke parole even though no prosecution could be had.

[141] This point is discussed in Shelton v. United States Parole Board, 388 F.2d 567, 575-77 (D.C. Cir. 1967).

Since the court or the board is not required to impose or reimpose a prison term, the individual must have an opportunity to affect the disposition. A parolee or probationer may well be able to argue for the imposition of a concurrent sentence.[142] In any event, he should have the opportunity to force the issue and receive a timely determination rather than be required to serve a prison term facing a violator's warrant lodged as a detainer.

Finally, there may be situations where the field officer believes that an alleged violation is sufficiently serious to bring to the attention of the court or the board but he may also believe that a sanction short of imprisonment is appropriate. The officer, after consultation with his superior, may conclude that a reprimand would be effective, that the burdens of supervision should be increased, or that more onerous conditions be imposed.[143]

Unless the individual's liberty is at stake, a more relaxed procedure seems permissible. The alleged violator should be given notice and an opportunity to appear and tell his story, but it seems unnecessary to require counsel, confrontation, a record of the proceedings, and the like. Should the revoking authority decide that imprisonment may be the appropriate sanction, then (unless the matter has progressed to the point where, for example, uncounselled and damaging admissions have been obtained) the proceeding may be converted into a more formal hearing.

In concluding this section, several matters that previously have been implied or touched upon obliquely should be clarified. The discussion concerning the need for a hearing and the assistance of counsel has assumed that the fault principle — the need to establish a violation — is operative. Yet, at least in probation proceedings, there is no unanimity in the law on this point. Indeed, Judge Bazelon, writing in *Hyser* v. *Reed,* stated, "But no specific violation of probation need be found in order to revoke probation." It has not been satisfactorily explained why this position can be maintained for probation and how a distinction can be drawn between probation and parole.[144]

The approach taken here has been to urge specificity and rationality in the imposition of conditions and to recognize the individual's legitimate expectations of continuity when those conditions are observed. When an alleged breach occurs, it should be regarded as a solemn event to be proved expeditiously, with adequate ceremony, and with basic fairness.

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[142] In probation proceedings counsel may often "plead to the violation" in return for dismissal of the criminal charge. On the other hand, he may plead to both if he is assured of concurrent sentences.

[143] *See,* MODEL PENAL CODE §305.16 (P.O.D. 1962).

[144] The leading "no need for a violation" case is Kaplan v. United States, 234 F.2d 345 (8th Cir. 1956).

IV. CORRECTIONS AND LEGAL CHANGE: IMPRISONMENT, LOSS AND RESTORATION OF CIVIL RIGHTS

"Can I legally be forced to get a short haircut?" "Can these guys censor my mail?" "Is solitary confinement legal?" "Can them guards run hoses over you?" These questions recently were asked of a young law student who was working in an experimental legal aid program at the Texas Department of Corrections. Prisoners not only want to know how to get out; they also want to know what legal claims they have within the prison walls.

There are few serious claims that penal institutions pursue a benevolent or therapeutic purpose. As a consequence, opponents of additional legal controls do not claim that those controls are inconsistent with a desire to help, but do claim that they might undermine security and discipline. A largely untrained prison staff must deal with large numbers of men; and therein lies the problem for prison officials, prisoners, and the law.

Some legal trends, such as providing access to the courts, religious freedom, and freedom from cruel punishments, are discernable. The other questions involved in this area, however, are extremely difficult to identify and even more difficult to resolve.

Professors Newman and Kimball recently wrote:

> The recent trend in prisoner petitions . . . involves challenges to some traditional *discretionary* powers of correctional administrators, thereby seeming to threaten correctional autonomy and to call into issue the professional correctional workers' claims of expertise.[1]

At one level, this is an accurate description of recent trends. At another level, recent revelations of widespread brutality, enforced homosexuality, torture by electricity, and wholesale corruption in the Arkansas prison system in addition to the claims of shocking brutality in other prisons put an Alice-in-Wonderland gloss on the concern for official discretion and expertise.[2] As Erich Fromm has put it, "There is no greater power over another person than to make him suffer without his being able to defend himself." [3]

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[1] Kimball and Newman, *supra* note 2, Chapter I, at 2. (italicized in original). In Note, *Judicial Intervention in Prison Administration*, 9 WILLIAM AND MARY LAW REVIEW 178, 192 (1967), the author suggests that while the entrance of the courts into the world of the prison is clear, it is also lamentable. Although he fears a breakdown of the prison system, he does not examine whether that might not be a desirable objective.

[2] *See* 47 NATIONAL COUNCIL ON CRIME AND DELINQUENCY NEWS, March - April 1968, at 6. Another report, *Homosexual Offenses in Philadelphia Prisons and Prison Vans*, prepared by an assistant district attorney for a trial judge, reveals the systematic and unchecked shocking debasement of younger prisoners.

[3] Fromm, ON THE SOURCES OF HUMAN DESTRUCTIVENESS, ALTERNATIVES TO HUMAN VIOLENCE, 15 (Ng ed. 1968).

Sykes,[4] Goffman,[5] and Glaser [6] have described the characteristics of the prison as a "total institution," to use Goffman's phrase. The uninitiated can never truly understand the impact of isolation from the free community, the utter dependence on others for the basics of life, the absence of responsibility for the kinds of decisions free men take for granted, and the need to present a "prison face" that is safe and within the expectations of one's guardians. We can have no pretensions that the introduction of a semblance of the rule of law into the prison community will eliminate or even go very far to ameliorate these aspects of prison life. However, we can deal with those aspects of the law that contribute to these problems and attempt substantive and procedural reform that may provide some measure of relief.

The basic hurdle is the concept of a prisoner as a nonperson and the jailer as an absolute monarch.[7] The legal strategy to surmount this hurdle is to adopt rules and procedures that permit manageable diversity, thereby maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have, as a consequence of their conviction and confinement, claims relating to the maintenance of contact with institutions and individuals in the open community and claims relating to conditions within the institution.

The legal status of a prisoner is determined in the first instance by laws that automatically impose a number of civil disabilities on the convicted felon.[8] This area of the law is replete with anachronisms and injustices; and unless radical changes are made, part of what we hope to accomplish through the recommended changes in sentencing procedures simply will not occur.

Although it is now generally accepted that a right not specifically lost by operation of law is retained,[9] those that are lost are part of a long and complicated list.[10] In 45 states, persons convicted of a felony lose their right to vote. In 41 states the right to hold public office is forfeited, and in 21 states eligibility for jury service is denied. In some states, the offender is not permitted to appear as a witness in a judicial proceeding. He is denied the right to obtain certain licenses and permits, the right to purchase firearms, and even the right to enter into contracts.

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[4] Sykes, THE SOCIETY OF CAPTIVES (1958).

[5] Goffman, ASYLUMS (1961).

[6] Glaser, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

[7] "[The prisoner] has, as a consequence, of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." Ruffin v. Commonwealth, 62 Virginia (21 Gratt.) 790, 796 (1891). Although not completely accurate today, this conception of the prisoner has vitality in many quarters.

[8] *See* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONS 133-35 (1959). The statutes often impose greater disabilities on a person committed to a term of imprisonment than on one whose sentence is suspended.

[9] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945). *See also* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 985 (1962).

In addition, statutes regulating professions and occupations as diverse as law, architecture, and barbering can be revoked to exclude the offender.[11] Where anachronistic civil death statutes continue in force, the civilly dead convict is not permitted to enforce his contracts, he may not bring a civil suit although one might be brought against him, his property may descend through the intestacy laws, and the nonoffending spouse may be permitted to marry without securing a divorce.[12]

Many of these disabilities will have no direct impact on the offender until his release or discharge from prison. No one appears to have clear-cut responsibility for informing the offender about the extent of the disabilities, and therefore most prisoners probably have merely a vague knowledge that they have lost not only their liberty but also some of their civil rights. The full impact will come when they are in the community. The psychological impact of losing even these most common civil liberties contributes to what Goffman calls the mortification and stripping processes common to total institutions.[13] The problems concerning civil disabilities are discussed in detail at a later point.

The old saw that prisoners have no rights never has been strictly accurate. Our courts generally have held that, aside from any additional constitutional or statutory requirements, prison authorities must keep their prisoners free from harm and provide the basic necessities of life: food, medical care, clothing, and shelter. In sum, there is a judicially recognized and enforceable duty to maintain the minimal conditions necessary to sustain life and health.[14]

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[10] *See generally* Note, *Civil Disabilities of Felons,* 53 Virginia Law Review 403 (1967). One of the more recent studies of what rights are lost was conducted in 1960 by the Federal Probation Officers' Association. Federal Probation Officers' Association, A Compilation of State and Federal Statutes Relating to Civil Rights of Persons Convicted of Crime (1960). A summary of those findings is reported in Cozart, *The Benefits of Executive Clemency,* 32 Fed. Prob. 33 (June 1968). The summary in the text is from this article.

[11] An unpublished survey conducted by the Joint Commission discloses that of 45 states responding, only seven have statutes prohibiting the hiring of ex-offenders, and 37 do not. Of the 37, however, 24 have unwritten policies against such hiring.

[12] *See* Tappan, Crime, Justice, and Correction 427 (1960).

[13] *See* Goffman, Characteristics of Total Institutions in Symposium on Preventive and Social Psychiatry 43-49 (1957), reprinted in Donnelly, Goldstein and Schwartz, Criminal Law 429-432 (1962).

[14] The custodian may be civilly liable for the infliction of harsh punishment on the prisoner, Topeka v. Boutwell, 53 Kansas 20, 32, 35 P. 819, 822 (1894), or negligently allowing a third person to inflict injuries on the prisoner, Ratliff v. Stanley, 224 Ken-

Although this is a most elementary form of "protection," the difficulties in fashioning appropriate remedies for enforcement and in obtaining legal assistance render effective enforcement of these and other claimed rights highly speculative. Charles Larsen, an inmate at San Quentin, has cogently expressed the frustration and bitterness caused by legal inadequacies:

> Justice, itself an elusive abstraction, is a fiction. It assumes an air of reality only because the majority of people in this country live their lives without being required to seek justice. The unfortunate ones who seek justice find that it exists only in the minds of judges.[15]

Access to the Courts

It is now generally acknowledged that prisoners must be guaranteed reasonable access to the courts.[16] In *Ex parte Hull,* the Supreme Court confirmed the principle by announcing that, "The State and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[17] State courts consistently have adhered to to the same view.

The problem here – as with any "right" possessed by prisoners – is not with the principle but the implementation. Particular problems in-

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tucky 819, 821-22 7 S.W.2d 230, 231-32 (1928) (involving jailer's acquiesence in the operation of a "Kangaroo Court"). For further discussion concerning civil liability of those in charge of prisoners, *see* Asher v. Cabell, 50 F. 818, 827 (5th Cir. 1892); Hixon v. Cupp, 5 Oklahoma 545, 551-52, 49 P. 927, 929-30 (1897). Annot. 14 AMERICAN LAW REPORTS 2d 353 (1950).

But see Hughes v. Turner, 14 Utah 2d 128, 129, 378 P.2d 888, 889 (1963), in which the prisoner complained about the quality of the prison food. The court found that hunger pangs were necessarily subjective and, based on the testimony of the prison physician that there had been no cases of malnutrition for *at least five years,* dismissed the claim.

[15] Larsen, *A Prisoner Looks at Writ-Writing,* 56 CALIFORNIA LAW REVIEW 343 (1968). The quoted statement was made in response to the rhetorical question: Why did I cease to litigate my case?

[16] One of the best discussions of this point is found in Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd on other grounds sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied,* 368 U.S. 862 (1961). *See also* Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964); Bolden v. Pegelow, 329 F.2d 95 (4th Cir. 1964).

[17] 312 U.S. 546, 549 (1941). The mere announcement of principle did not dramatically increase the load in the federal courts. The increase occurred, however, with the recent expansion of the grounds on which a conviction might be challenged, liberalization of the doctrine of "exhaustion of state remedies," and a more flexible view of the uses of habeas corpus. The number of federal habeas corpus petitions from state prisons increased from 814 in 1957 to 4,845 in 1965 and shows no signs of relenting. 3 U.S. CODE CONG. AND AD. NEWS 3663-64 (1966).

It should be made clear that the reference is to prisoner's challenges to the legality of their conviction or present confinement.

clude access to, and communication with, legal counsel, access to legal materials, and reasonable opportunity to prepare and file legal papers.

Although prison officials privately may grumble about interference with rehabilitation programs, they have not had the temerity to challenge the principle of access to the courts. They do, however, insist on censorship of mail, even to attorneys, and make it difficult to gain access to law books.[18] The courts recognize the need to maintain security and discipline, but they refuse to allow prison officials absolute discretion, particularly when the issue involves access to the courts.

In *Smartt* v. *Avery*[19] the court was confronted with a parole board rule that any prisoner who sought a writ of habeas corpus would have his parole hearing delayed for one year. The court determined that this rule was intended to deter prisoners from exercising their legal rights and therefore could not be maintained. Perhaps the most interesting recent development in this area involves prisoners who are not lawyers providing limited legal assistance to other prisoners. In particular, the question involves a prison rule that forbids prisoners from preparing habeas corpus petitions for other prisoners.

What began in *Johnson* v. *Avery*[20] as a motion for law books, a typewriter, and release from eleven consecutive months in solitary confinement resulted in a decision permitting prisoners to assist one another in the preparation of writs. The prison officials appealed the case and succeeded in obtaining a reversal.[21] In reversing, the appellate court did not meet the issues raised by the lower court, contenting itself with a restrictive interpretation of the federal statute and then treating the matter in terms of the unauthorized practice of law. The court found that the petitioner had neither legal training nor a license to practice law and stated that it was unwilling, in effect, to admit Johnson to the practice of law.

There is, of course, some basis for concern about non-lawyer prisoners providing legal services for the other inmates. One problem is that those services may be of a markedly inferior quality. Another concern is that prison writ-writers can cause problems by demanding payment for their services, by engaging in blackmail or threats when payment is not forthcoming, and by creating false hopes and fostering rumors about "important new decisions." The issue of quality in legal services, however, is a diversionary tactic. More realistically, the choice is between limited legal asssistance from an inmate or none at all.[22]

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[18] Charles Larsen, an inmate, describes the San Quentin Prison Library, as containing the California Court Reports which terminate at 1955; California Jurisprudence, McKinney's Digest, and Corpus Juris which have not been replaced by their respective second series; Shepard's Citations that terminate at 1954; and *no* Supreme Court Reports. Larsen, *supra* note 15, at 354-55 n.24 (1968). This article was censored by the California Department of Corrections and followed by an article prepared by the prison librarian who does not dispute any of these assertions. Spector, *A Prison Librarian Looks at Writ-Writing*, 56 California Law Review 365 (1968).

[19] 370 F.2d 788, 790 (6th Cir. 1967).

[20] Johnson v. Avery, 252 F. Supp. 783, 787 (M.D. Tenn 1966). For a favorable discussion of *Johnson*, see Note, *Prisoner Assistance on Federal Habeas Corpus Petitions*, 19 Stanford Law Review 887 (1967).

[21] Johnson v. Avery, 382 F.2d 353, 356-57 (6th Cir. 1967), *cert. granted*, 390 U.S. 943 (1968).

The matter is far from being settled. The Supreme Court has agreed to review the case,[23] and in view of its previously expressed concern for the extension of legal services to those who cannot obtain them, the district judge may well be vindicated.[24]

The Right to Reasonable Communication with Counsel

Assuming that a prisoner establishes an attorney-client relationship, he has the right of reasonable communication with counsel.[25] The legal basis for this rule is the constitutional right to the *effective* assistance of counsel plus the historic protection afforded the attorney-client relationship.[26]

Although the courts have made it clear that a prisoner has no absolute right to use the mails or to receive an unlimited amount of mail from any source,[27] every presumption should be against the limitation or censorship of correspondence with legal counsel.[28] In *Haas* v. *United States*,[29] the court found no prejudice in the censorship of several letters between the defendant and his attorney and upheld the lower court's refusal to dismiss a criminal charge. The opinion suggests that a distinction should be drawn between the situation where the use of the mail is the only effective means of communication and where, as here, the attorney was never denied the right to see his client during regular visiting hours and no attempt was made to overhear their conversations.

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[22] Indeed, use of the term "legal assistance" is somewhat misleading. The petition requires only a short, simple factual statement. The fact is that most prisoners cannot do this; the average prisoner has had only eight years of school, and three times as many prisoners as the general population suffer from mental deficiencies. *See* recent data in Note, *Constitutional Law: Prison "No-Assistance Regulations and the Jailhouse Lawyer,"* 1968 Duke Law Journal 343, 360-61.

As one lawyer put it, "Not unnaturally, a semiliterate prisoner prefers the aid of a convicted murderer to no help at all. Instead of worry over competition with members of the Tennessee Bar, the circuit court might have provided some reasoning toward solution of the dilemma properly recognized by the district court." Krause, *A Lawyer Looks at Writ-Writing*, 56 California Law Review 371, 376 (1968).

[23] *Cert. granted*, 390 U.S. 943 (1968).

[24] *Cf.* NAACP v. Button, 371 U.S. 415 (1963).

[25] *See* Annot. 5 American Law Reports 3d 1360 (1966).

[26] *See, e.g.*, People v. Superior Court, 273 P.2d 936, 938 (California District Court of Appeals 1954).

[27] *See, e.g.*, Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955). In Glaser, The Effectiveness of a Prison and Parole System 123 (1964), the author states that routine censorship of inmate mail was abolished in most federal prisons by 1962.

For an examination of the problem in terms of the First Amendment right of free expression *vis à vis* use of the mails, *see* Note, *The Right of Expression in Prison*, 40 Southern California Law Review 407, 415-20 (1967).

[28] In Brabson v. Wilkins, 25 A.D.2d 610, 611, 267 N.Y.S.2d 580, 582 (1966), the court reversed a ruling that the warden could not interfere with communications addressed to courts or government officials and allowed the warden to censor material not relating to the legality of the detention or to the treatment accorded during detention.

[29] 344 F.2d 56, 67 (8th Cir. 1965).

The only justifiable reason for censoring mail to legal counsel is a fear of conspiratorial activity. If the inmate complains about the prison or raises issues unrelated to the basis of the attorney-client relationship, that would seem to be a matter for the attorney to resolve. He might elect to request censorship or resolve it himself with the inmate.[30] Any limitations on communication with counsel should be made a matter of record, with supporting reasons, and the attorney involved should be notified of the action.[31]

Electronic eavesdropping on conversations between the prisoner and his attorney must be severely condemned, and any evidence obtained as a result should be deemed inadmissable.[32] There are situations that require security measures even if it means breaching the absolute privacy of the attorney-client relationship. Physical obstructions or prison personnel standing near the place of discussion have been found justifiable when the prisoner's prior record or present conduct indicates that he may be a security risk. However, if the prison authorities create undue hardships for effective and private consultation, the courts have been willing to order the use of other, more reasonable, techniques.[33]

Access to Legal Materials

With legal counsel essentially unavailable and the question of inmate assistance in preparing applications for habeas corpus awaiting final resolution, access to the courts becomes largely dependent upon the inmate's access to legal materials and his opportunity to prepare his own documents. *Bailleaux* v. *Holmes*[34] appears to be the first case to give serious consideration to the possibility that a denial of legal materials could preclude meaningful access to the courts. One of the earlier *Chessman* cases had adopted this position,[35] but the decision was reversed by the California Supreme Court on the questionable ground that Chessman was under sentence of death and thus civilly dead. As a consequence, access to a law library was to be viewed as "a privilege and not a right." [36]

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[30] *See* Spires v. Dowd, 271 F.2d 659, 661 (7th Cir. 1959), in which a judge of the sentencing court requested that the warden "discourage" the prisoner from communicating with him. The court held that Spires could mail pleadings to the court but not directly to the judge. After this "victory," Spires sued the judge, and the court held that he had stated a cause of action. Spires v. Bottorff, 317 F.2d 273, 274 (7th Cir. 1963).

[31] Of course, a conspiracy will be difficult for the prison to prove. The consideration that should control, however, is that it is more difficult to prove that all attorneys who correspond with prisoners are likely to engage in unlawful conduct.

[32] The leading case is State v. Cory, 62 Wash. 2d 371, 382 P.2d 1019 (1963). *See* Annot., 5 AMERICAN LAW REPORTS 3d 1360, 1375-79 (1966).

[33] The electronic eavesdropping is, of course, always done surreptitiously while the other measures are, of necessity, open and obivous. One might go further and suggest that any technique used to monitor attorney-client conversations which is not "open and obvious" is beyond the authority of prison officials.

See Travers v. Paton, 261 F. Supp. 110, 117 (D. Conn. 1966), in which the court held that even though a prisoner was filmed during a parole interview without his knowledge or consent and the film shown on a local television station, the prisoner suffered no actionable invasion of privacy.

Although *Bailleaux* later was reversed, it is instructive to examine the prisoners' claims and the lower court's response.[37] The prisoners claimed that they either were illegally confined, or that they had proceedings pending, and that they had to prepare cases themselves since they could not afford an attorney. They attacked:

1. the prohibition against in-cell study;
2. inability to purchase books;
3. censorship of communications with courts and attorneys;
4. confiscation of documents found outside the library;
5. complete denial of access to legal materials for prisoners held in isolation;
6. restrictions on the use of funds to buy legal materials;

The district court ruled that:

1. Prisoners should be allowed to use legal materials in cells where access to the library is too limited to allow proper preparation.
2. The right of access to the courts implies the right of access to the applicable law and thus prisoners must be allowed to buy some law books.
3. The right to inspect letters to attorneys does not confer either the right to delay or the right to pass on the sufficiency of pleadings.
4. Petitions to the courts are not to be subject to confiscation simply because they are prepared in cells instead of in the library.
   But
5. Isolation restrictions were upheld.
6. The warden was conceded the power to prevent prisoners from using all their money to buy legal materials.

If the district court's ruling had been upheld, it would have represented a substantial judicial inroad into prison administration. The great majority of courts, however, are not so solicitous of claims by prisoners and seem reluctant to invite "more business." We are thus left with a rather absolute right of access to the courts but also with severely limited opportunities for legal assistance and access to legal materials.[38]

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[34] 177 F. Supp. 361, 364 (D. Ore. 1959).

[35] People v. Superior Court 273 P.2d 936, 937-38 (California District Court of Appeals 1954).

[36] *In re* Chessman, 44 Cal. 2d 1, 7-9, 279 P.2d 24, 28 (1955).

[37] Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied,* 368 U.S. 862 (1961).

It cannot seriously be expected that prisoners will desist in their efforts to bring their grievances, real or imagined, before the courts. Indeed, it is ironic that we should stress the need for the prisoner to conform to the rule of law, and then with one hand hold out the right of access to the courts and with the other either reproach him for his efforts or bar the way.

Providing Inmates with Legal Counsel

The solution does not seem to lie with the maintenance of complete prison law libraries or, as some prisons now do, with making available to prisoners standard forms to be used in applications for habeas corpus. Since most prisoners have only elementary education, this would simply reinforce the writ-writing system and give "jailhouse lawyers" an added boost.

A more sophisticated and comprehensive approach would be to provide inmates with the assistance of legal counsel. This could be done either through local legal aid societies or public defender offices. Since it is important that the lawyer gain the prisoner's trust, he should not appear to be an agent for the state or connected in any way with the institution. If no agency exists that provides legal services, then the community should create one or perhaps experiment with a fee-retainer system for local attorneys who are willing to perform the service.

The inmate attorney service should not deal exclusively with questions involving the legality of the confinement.[39] Prisoners have numerous legal problems not associated with, but perhaps exacerbated by, their confinement. The inmate lawyer staff could form part of the classification-counselling team. An entering prisoner would be given a legal check-up much as he is given a medical examination. Problems relating to his family, or car payments, or veteran benefits could be identified and resolved, thereby relieving at least part of the prisoner's tension.

No exaggerated claims can be made for this approach. It is difficult to know if the benefits would equal the costs, and we cannot be certain that well-qualified lawyers could be attracted and retained, although the early days of an experiment have their own appeal. Surely such a program is worth trying in a few jurisdictions in order to learn whether it would be valuable. If the increasing volume of prisoners' complaints is any indication of where we are headed, the alternatives seem none too pleasant.

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[38] Even the more liberal lower court opinion in Johnson v. Avery, 252 F. Supp. 783, 787 (D. Tenn. 1966) stated that the state is not required to furnish legal materials and reports to the prisoner.

[39] This limitation is proposed in Note, *Legal Services for Prison Inmates*, 1967 WISCONSIN LAW REVIEW 514, 529.

Cruel and Unusual Punishments

Prisoners have an absolute right to be free of cruel and unusual punishments. The Eighth Amendment's proscription of such punishments is applicable to the states[40] and includes prisoners.[41] In addition to the constitutional proscription, some states have adopted statutory prohibitions against cruel punishments.[42] The prestigious American Correctional Association states that "penalties shall not be cruel, inhumane or degrading, and no corporal punishments shall be employed as correctional measures."[43] Although it is an easy matter to state the basic right, it is difficult to define a violation precisely and even more difficult to enforce the right.[44]

In a case involving the California prison system the plaintiff, in a federal civil rights action, showed that during his eleven-day confinement in a 6′ by 8′4″ "strip cell," he was not adequately protected from the wet weather; he was deprived of all items by which he might maintain bodily cleanliness; he was forced to eat the meager prison fare in the stench and filth caused by his own vomit and body wastes; he could wash his hands only once every five days; and he was required to sleep naked on a stiff canvas mat placed directly on the cold concrete floor.[45] The court expressed the usual judicial reluctance to intervene in the administration of penal institutions but determined that

> when, as it appears in the case at bar, the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the court must intervene . . . to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.[46]

This is not an isolated example. As more prisoners gain access to the courts, we learn about punishments that require prisoners to lie naked on a concrete floor at temperatures of 40 degrees;[47] of prolonged exposure to primitive plumbing "encrusted" with filth;[48] of the arbitrary withholding of food; of indiscriminate clubbings by guards; and of repeated use of tear gas.[49]

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[40] Robinson v. California, 370 U.S. 660, 667 (1962).

[41] *See, e.g.,* Landman v. Peyton, 370 F.2d 135, 137-38 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967).

[42] California Penal Code §§2652-53 explicitly prohibit corporal punishment and use of devices such as the thumb-screw and gag. Violation is treated as a misdemeanor subject to fine and loss of employment.

[43] American Correctional Association, Manual of Correctional Standards (3d ed. 1966).

[44] Professor Norval Morris, in describing his recent visit to Swedish penal institutions, writes that "a complaint to the Ombudsman by a group of inmates in open institutions that the guards were occasionally at nights shining flashlights into their cells to make sure that they were still there, and that this was a serious interference with their right to a good night's sleep, was taken quite seriously by the press." Morris, *Lessons From the Adult Correctional System of Sweden,* 30 Fed. Probation 3, 5 (December 1966).

[45] Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). The court issued an injunction against these practices but refused to award money damages.

[46] 257 F. Supp. at 680.

In one of the most enlightened opinions ever written about prisons, Judge Sobeloff of the Fourth Circuit Court of Appeals recognized the basic problems and proposed some answers.[50] He noted that Virginia prison officials were lax by granting wholesale discretion to untrained lower-rank personnel in the administration of the disciplinary cell blocks. While the prison had written regulations governing the conduct at issue, no attempt was made to ensure their observance.

Judge Sobeloff indicated that courts are not called upon and have no desire to lay down detailed codes for the conduct of penal institutions. But he emphasized that courts have the duty to act when men are exposed to the capricious imposition of added punishments. He urged prison authorities to adopt procedures that allow prisoners to be heard and recommended procedures that are included in the Manual of Correctional Standards. However, recent events at the Virginia State Penitentiary — charges of placing all 1,300 prisoners in isolation, prisoners receiving one meal every third day, using tear gas and mace — suggest that something more than well-intentioned judicial opinions are required.

Recovery of money damages, an increasingly popular device, may be one solution. A Louisiana court recently allowed a recovery to the parents of a juvenile who had been beaten to death with leather straps by officials at a state industrial school.[51] The Supreme Court has interpreted the Federal Tort Claims Act to be applicable to federal prisoners.[52] The federal Civil Rights Act was used as the basis for many of the cases previously referred to, and its continued use by state prisoners makes it an important companion to the more frequently used writ of habeas corpus.[53]

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[47] Roberts v. Peppersack, 256 F. Supp. 415, 419 (D. Md. 1966).

[48] Wright v. McMann, 387 F.2d 519, 521 (2d Cir. 1967).

[49] Landman v. Peyton, 370 F.2d 135, 137-38 (4th Cir. 1966).

[50] *Id.* at 140-41.

[51] Lewis v. State, 176 So. 2d 718, 729-30 (La. App. 1965).

[52] United States v. Muniz, 374 U.S. 150, 158 (1963). Under 1966 amendments to the Tort Claims Act, a claimant is required to file an administrative claim before he can file a tort suit. This requirement applies to all injuries sustained since January 1967. Ten claims have been made under this procedure, ranging in amounts from $10,000 to $500,000. Four of these claims have been denied, and six are still pending. United States Department of Justice statistics indicate that since the *Muniz* decision there have been 142 suits filed under the Act. Nineteen of these suits have been settled with awards for the inmate-plaintiff. The awards have ranged from $750 to $110,000. Eighty-five suits have been dismissed and, as of August 15, 1968, thirty-eight cases were still pending. Letter from Clair A. Cripe, Acting Legal Counsel, United States Department of Justice, Bureau of Prisons, August 15, 1968.

[53] *See generally infra* note 65; Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE LAW JOURNAL 506 (1963).

Lawyers must begin to make creative use of legal remedies not often used on behalf of prisoners. For example, mandamus, injunctive relief, declaratory judgments, and even contempt for violation of the order of the court "to keep and hold *safely*" the prisoner.[54]

Religious Freedom

The extent to which religious practices can be regulated or denied by prison authorities has been the subject of many recent decisions. The Black Muslim sect has initiated many of the suits, and as a consequence the issue of racial segregation also has come up for judicial scrutiny.

The courts have unequivocally established that a prisoner has the right to his own religious beliefs and a qualified right to practice his religion. Even in the open community, while freedom of religion is accorded great respect, it is subject to reasonable regulation in order to achieve some valid governmental objective.[55] Freedom of religion in prisons is similarly limited. If, for example, a prisoner is restrained from attending religious services because he sexually assaulted others in the past and there is reason to believe it is unsafe to allow him to attend open services, the restriction has been upheld.[56] On the other hand, prison officials are "advised" to make suitable arrangements to transport prisoners to religious services.[57]

The problems that have been presented to the courts involve claims concerning discrimination between religions, punishment because of beliefs, and restriction of access to religious facilities or services.[58] Undoubtedly, the religious issues raised by Black Muslims have placed a serious strain on institutional authorities and on the ingenuity of the courts. Prison authorities consistently express concern about disruption of the prison routine, the fostering of racial antagonisms, and the difficulty of dealing with Muslims who tend to demand collective treatment in all phases of prison life. On the other hand, the Muslims find that the prisons are ideal places for recruitment (the late Malcolm X was recruited and his identity as a person salvaged while in prison) and ironically, the stern discipline and racial pride demanded of Muslims has salvaged many black prisoners thought to be beyond reclamation.[59]

So long as prison authorities do not discriminate among religions and do not attempt to preclude the Black Muslims from all access to their religious documents and religious practices, the courts will defer to administrative judgments. For example, in the New Jersey State Prison the

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[54] *See* Ridgway v. Superior Court, 74 Ariz. 117, 125-26, 245 P.2d 268, 274 (1952); State v. Brant, 209 A.2d 455, 458 (R. I. 1965).

[55] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1939).

[56] Cleggett v. Pate, 229 F. Supp. 818, 819-21 (N.D. Ill. 1964).

[57] Casey v. Fay, 22 A.D.2d 941, 942, 256 N.Y.S.2d 97, 98 (1964).

[58] *See* Annot. 12 American Law Reports 3d 1276 (1967).

[59] *See* Little, *The Autobiography of Malcolm* X 237-241 (1965).

Muslims were permitted to receive religious tracts; they could purchase their Qur'an and read it in their cells; they could gather in the exercise yard in numbers up to six to discuss their religion; and they had visiting and correspondence privileges with a Black Muslim minister. The Board of Prison Managers, however, balked at allowing them to assemble to hear the preaching of a Muslim minister. The Board was upheld by the New Jersey Supreme Court on the basis that the requested practices would produce further upheavals and violence within the prison system.[60] Assuming that the evidence of potential upheavals and violence was clear, the case illustrates what a delicate balance must be struck between an overriding governmental objective and First Amendment freedoms.

Glaser reports that federal prisons have made gains in solving the so-called "Muslim problem" by departing from their earlier approach of isolating the Muslims. Muslim opposition to the prison program was overcome by assigning Muslims throughout the program, no longer making them conspicuous. Even the Muslim leaders transferred to federal prisons because of their intractability while in District of Columbia prisons showed a favorable response.[61]

This approach might be contrasted with the approach of officials at the Virginia State Penitentiary. When a Muslim leader asked permission to hold religious services and then refused to divulge the names of the prisoners for whom he spoke, the superintendent summarily ordered the leader to the maximum security unit where he remained for four years. The court found this was arbitrary punishment and ordered his release from the maximum security unit.[62]

Segregation and Discrimination

Unlike the area of religious freedoms, there are relatively few decisions that deal directly with racial segregation in prison. The American Correctional Association is specific in its opposition to discrimination based on race or color.[63] In this era of *Brown* v. *Board of Education* and broad civil rights legislation, it seems implausible that a state or federal law *or policy* of racial segregation could withstand judicial challenge.[64]

Where the issue has come up, the prison authorities argue that racial segregation is a matter of routine prison security and discipline and therefore not within the scope of permissible inquiry by the courts.[65] At least one court squarely met this argument and held that:

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[60] *See* Cooke v. Tramburg, 43 N. J. 514, 523, 205 A.2d 889, 894 (1964).

[61] Glaser, The Effectiveness of A Prison and Parole System 153-54 (1964).

[62] Howard v. Smyth, 365 F.2d 428, 431 (4th Cir.), *cert. denied,* 385 U.S. 988 (1966).

[63] American Correctional Association, Manual of Correctional Standards 130 (3d ed. 1966).

[64] 347 U.S. 483 (1954). *But see* Nichols v. McGee, 169 F. Supp. 721, 724 (N.D. Cal.), *appeal dismissed,* 361 U.S. 6 (1959) holding that "by no parity of reasoning can the rationale of *Brown* v. *Board of Education* . . . be extended to state penal institution. . . ."

> This court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in the Alabama penal facilities.[66]

The court went on to require adherence to a judicial plan for the desegregation of Alabama's penal facilities.

Let it be clear that what is objected to here is a blanket policy of racial segregation based either on simple and insidious racism or on the assumption that it is required to maintain prison discipline. Separation of troublemakers, regardless of race, obviously is warranted. Separation by race because trouble is assumed is simply beyond the authority of any person acting under state or federal law.

Legal Norms and Prison Life

What about the prisoner who does not want a short haircut, or does not agree with the decision to revoke his good-time credits, or believes that punishment "in the hole" is unfair or even double jeopardy, or desires to challenge a classification or transfer decision? Are these claims subject to judicial scrutiny? Should they be the subject of specific legislation or left to the rule-making authority of prison officials? How do we achieve some balance between the obvious need to maintain prison discipline and the not-so-obvious need to provide a "rule of law" for prisoners?

One is troubled about conceding absolute discretion to prison officials, indeed to any government functionary, who daily can control the lives of a significant number of people. Actually, discretion is only nominally granted to prison officials. Realistically, day-to-day power is exercised by those who have the most contact with the prisoners – the guards. Judge Sobeloff put it bluntly:

> In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the "training" of the officers in dealing with obstreperous prisoners is but a euphemism in most states.[67]

The tendency to judicialize decision-making should be tempered by the need to preserve administrative morale, develop competence, and fix responsibility. Yet, as Professor Jaffe has written of administrative agencies, "The guaranty of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system."[68] Somehow we do not want the judiciary to "run the show," and until recently the judicial "hands-off" policy was undented. We do, however, want to reach illegality and arbitrariness.

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[65] In Dixon v. Duncan, 218 F. Supp. 157, 159-60 (E.D. Va. 1963), white prisoners successfully sued for an injunction against discriminatory integration of the dormitories. They argued that Negro prisoners had the choice of living in all-black or integrated dormitories and that, if whites alone were required to integrate, dissension and strife would run high because of the large number of Black Muslim prisoners.

[66] Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968).

[67] Landman v. Peyton, 370 F.2d 135, 140 (4th Cir. 1966).

The fact that prisoners have legally enforceable rights in some areas of fundamental importance has been established.[69] How much further should the judiciary go? The answer, in part, depends on how much further the prisons are willing to go.

Prisoners should have every opportunity to comply with rules that are announced in advance and are capable of being complied with. Rules should be enforced within a procedural framework that is known, operates fairly, and gives the appearance of operating fairly.[70] The rule-making authority of prison officials enables them to make this possible.

The assumption underlying these suggestions is that the rule of law and legal process are part of the free community's way of life, and every consideration should be given to the inculcation of community values while in prison. We do not expect a full-blown hearing after registering a complaint about our wife's cooking or cleaning. But we do expect some kind of procedure and a fair decision when someone with constituted authority purports to affect our property or personal rights. Finding a basis for making similar distinctions in the decision-making functions of prison authorities is extremely difficult, and the formula for a solution is most elusive.[71]

In order to have a principle that separates the housekeeping decision from the right-determinative decision, it is necessary to go beyond the suggestive metaphors. The principle suggested here is that *the greater the impact on the conditions of present or prospective liberty, or the physical and psychic integrity of the prisoner, the greater (or more plausible) the claim to substantive and procedural safeguards.*

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[68] Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 324 (1965).

[69] If conduct which occurs within the prison is to be used as the basis for a criminal prosecution, ordinary standards relating, for example, to *confessions*, Brooks v. Florida, 389 U.S. 413 (1967), and to *search and seizure*, People v. Dorado, 62 Cal. 2d 338, 356-57, 42 Cal. Rptr. 169, 179-80 398 P.2d 361, 371-72 (1965), would apply.

[70] *See* Landman v. Peyton, 370 F.2d 135, 140-41 (4th Cir. 1966).

[71] Professor Sanford Kadish faced the same issue in analyzing what he calls "sentencing-type dispositions." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARVARD LAW REVIEW 904, 924 (1962). In developing a rationale for the development and use of legal norms in the police and sentencing functions, Kadish states that for prisoners the applicable principle must be the same but that the substantive standards and procedural mechanisms need not necessarily meet the same specifications. Daily housekeeping decisions, as he terms them, are not of the same order as sentencing-type decisions governing release. In the case of the parolee, he asserts, his presence in the general community removes him from the scope of housekeeping decisions no matter how insistently we apply the "within prison walls" metaphor. *Id.* at 925.

The principle can perhaps be tested by applying it to the questions posed at the beginning of this section. The prisoner's right to refuse to have his hair cut short may be contrasted with decisions concerning the acquisition and retention of good-time credits.

The haircut problem is especially interesting because all would agree that outside the regimen of some "total institution," or condition of altered status (*e.g.*, the military), the authorities have no right to make decisions concerning the style of one's hair. Such matters are left to the realm of good taste and the approval or disapproval of peers. (Some silly school administrators may confuse public education facilities with "total institutions" and attempt to regulate style, but this is episodic and of doubtful legality).

Prison officials explain that an entering prisoner's hair must be cut short for health reasons. Yet the same rule is not applied to female prisoners. An interesting practice has developed in some areas whereby the local sheriff takes it upon himself to "preserve health and decency" by shaving the beards and clipping the long hair of his charges. The point is that while short haircuts may be rationally explained, the actual practices cast doubt on the truth of that explanation and, in some cases, make it clear that they are used as punitive measures. Unless a clearly punitive purpose can be discerned, however, the invasion of physical or psychic integrity is so slight that the decision might well be placed beyond the purview of judicial scrutiny.

Good-time credits, normally a matter of statutory formula and dependent on administrative reporting, actually serve to reduce the time spent in prison. Any decision affecting these credits is intimately connected with liberty in its most fundamental sense and thus comes within the scope of the principle proposed here.

The Model Penal Code's approach to good-time laws is fairly typical:

> For good behavior and faithful performance of duties, the term of imprisonment of a prisoner sentenced or committed for a definite term of more than thirty days shall be reduced by (five) days for each month of the term. Such reduction of terms may be forfeited, withheld or restored by the warden or other administrative head of the institution, in accordance with the regulations of the Department of Corrections.[72]

There is, of course, a basic policy issue involved in determining whether to legislate the rules for reduction or forfeiture or to delegate rule-making power either to the general administrative body or to each particular institution. Whatever decision is made, the principles of announcing the rules in advance and providing informal but essentially fair procedures should prevail.[73]

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[72] MODEL PENAL CODE §303.8 (P.O.D. 1962). In an earlier draft, the Code took the position that there could be no reduction or forfeiture of good-time credits except after a hearing and on recommendation by the Adjustment Committee or similar institutional committee. MODEL PENAL CODE §305.8 (Tent. Draft No. 5, 1956).

Prison officials make use of a number of sanctions. Some of these are: (1) disciplinary segregation, (2) temporary restriction to quarters, (3) warnings, (4) requiring an apology to the injured party, (5) deduction of meritorious service pay, and (6) a host of other rather minor deprivations such as restrictions on recreation privileges and commissary purchases. Although correctional authorities may take the view that any disciplinary measure will have the most correctional benefit if it is imposed by an administrative tribunal with regular procedures, only disciplinary segregation clearly fits within the principle of substantial impairment of liberty or personal integrity.

Classification of entering prisoners is a difficult matter. The prisoner's prospects for training, the unit to which he is assigned, or even the institution to which he may be sent, are all potentially involved. A too-facile disposition of the matter recites: if the judicial order of commitment is to the Attorney General or the Director of Corrections, then the decisions concerning the precise way in which the specified time is spent has been conceded to the administrators. Classification involves diagnosis and the preparation of a suitable program and, for good or evil, ultimately depends on the expertise and discretion of prison authorities.

Yet the decisions made here – possibly wrong or arbitrary – have a substantial impact on the prisoner's future prospects. Do we want a judge peering over the shoulder of a diagnostician? Hardly. But one can recognize that prison administrators may possess valuable expertise and nevertheless suggest that a prisoner who is aggrieved by their decisions should have an opportunity for a fair administrative review. This does no more than seek to create a role for the prisoner in his future destiny and surely is consistent with the rhetoric of individualization and rehabilitation. It also allows the system itself to correct any errors, because judicial review would apply only to egregious errors or practices involving grossly unequal treatment to a given class or individual.

The Supreme Court recently has served notice that transfer procedures within a correctional or medical system are within the scope of constitutional scrutiny. In *Baxstrom* v. *Herold*[74] the Court held that a

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[73] One author argues that regular good time often is defective as an incentive because the procedure for denying it is so cumbersome that it is seldom denied. He points out that when inmates come to regard good time as a right, it loses its motivational value. Glaser, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 236 (1964).

Obviously, the ease with which good time is earned is a separate issue. But in any event, if prisoners come to regard credit as a right, it would also follow that they would be jealous of the way in which it might be lost.

For a thorough survey of cases and statutes dealing with the granting and cancellation of good-time credits, *see* VOLUNTARY DEFENDER'S COMM., A SURVEY OF THE RIGHTS OF PRISONERS IN CONFINEMENT IN THE UNITED STATES 21-29 (First Draft, August 1967).

> petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing expiration of a penal sentence.[75]

Baxstrom should serve notice that administrative transfers that have serious consequences on the status and conditions of confinement of an individual are not within the unreviewable discretion of administrators. It is clear, however, that the Court did not hold that the objectives sought to be accomplished – detention in a special facility for an extended term – were invalid. The Court found that the classification upon which the state made procedural distinctions was irrational.

A somewhat different, yet related, problem is encountered in the attempt to transform a civil commitment into a criminal commitment by the simple device of administrative or executive transfer.[76] Michigan courts have been alert to this problem and have not permitted persons committed as "sexual psychopaths" to be transferred from a hospital to a prison.[77] The basis for this type of decision is the procedure used in the original deprivation and the status that accompanies the individual to the institution. That is, a civil commitment and its accompanying civil status cannot be transformed into a *de facto* criminal status without criminal procedure. If the attempted transfer is from a penal status and a penal institution to a penal status in a civil (mental) institution, then, barring equal protection problems, the issue may be somewhat different. One could argue that the state, having gained the general right to deprive a person of his liberty for a stated time, is free to make the best use of its available facilities provided that there is no depreciation of status or increase in term.

It would be difficult, however, to deny that transfer to a mental institution, even without an increase in the duration of commitment, affects the basic conditions of liberty. Despite massive efforts to remove any stigma from the label "mentally ill," the stigma persists. This type of transfer should be subject to a judicial proceeding.[78]

Transfer from one penal or correctional institution to another within the same jurisdiction may pose problems of substantial deprivation of liberty or personal integrity. In a jurisdiction with a variety of institutions created to meet the differing needs of prisoners, one will encounter the situation of transfer from a minimum-security, high rehabilitation institution to a maximum-security, basically custodial institution. The effect on the prisoner is not to be deprecated. These decisions call for the application of previously announced standards and regular internal procedures.[79]

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[74] 383 U.S. 107 (1966).

[75] *Id.* at 110. *See also* Cameron v. Mullen, 387 F.2d 193, 199-202 (D.C. Cir. 1967).

[76] For an excellent discussion, *see* Note, *Transfer of Juveniles to Adult Correctional Institutions*, 1967 WISCONSIN LAW REVIEW 866.

[77] *See In re* Maddox, 351 Mich. 358, 370-73, 88 N.W.2d 470, 476-78 (1957).

[78] *Cf.* State v. Bray, 67 N.J. Super. 340, 345-47, 170 A.2d 501, 503-04 (1961).

Loss and Restoration of Civil Rights

At the beginning of this section we briefly reviewed the automatic loss of civil and political rights as a partial indicator of the prisoner's status. It was suggested that the major impact of the loss occurs on release or discharge from prison and thus further discussion was deferred.

The writer is unaware of any complete and up-to-date listing of disabilities or of any satisfactorily stated rationale for the law as it now exists. One thing seems certain: the disabilities directly and indirectly imposed by law are far more extensive than is commonly believed. One writer lists 59 occupations – from accountancy to yacht selling – from which a former offender may be barred, and this listing does not purport to be exhaustive.[80] The various rationales offered for the general practice or for particular disabilities include these:

1. The conviction is a *de facto* finding of incompetency to perform the relevant function.
2. Disabilities should be viewed as additional punishment.
3. The purity of the ballot box should be preserved.
4. Insurance against corruption should be maintained in vital areas.[81]
5. High professional and occupational standards should be fostered.[82]

There are so many problems associated with this area of law that one scarcely knows where to begin. At the outset, there is overwhelming conceptual and semantic confusion. In most jurisdictions the disabilities flow from the conviction of a felony, but in others the key phrase is

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[79] Habeas corpus is an appropriate remedy to challenge such decisions. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.S. 482, 484-85, 174 N.E.2d 725, 726 (1961); 215 N.Y.S.2d 44, 45-46. In Peyton v. Rowe, 391 U.S. 54, 55 (1968), the Court made it clear that Federal habeas corpus is not limited to claims to immediate release.

[80] Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASHINGTON UNIVERSITY LAW QUARTERLY 147, 156.

[81] *See* De Veau v. Braisted, 363 U.S. 144, 153-54 (1960), in which the Court upheld a New York law barring ex-felons from holding office in waterfront labor organizations.

[82] *See generally* Note, *supra* note 10. To the extent that civil disabilities are defended as additional punishment and thus presumably related to the seriousness of the offense, the term felony hardly is adequate. There was a time when the worst label that could be affixed to a citizen was felon. However, the term now is so diluted that it includes such offenses as wife-beating, seduction, homosexual conduct, indecent exposure, and conspiracy to commit a misdemeanor. Since there is no finding of actual incompetency and the disability is imposed automatically, it is difficult to argue that the loss operates to assure either competency or high occupational standards.

"infamous" crimes or crimes involving "moral turpitude." In still others, the crime must be one that *may* be punished by confinement in the state penitentiary, while in others the disability depends on *actual* imprisonment. At times, only enumerated offenses carry civil disabilities. The disabilities are imposed without regard to the offender's ability to exercise the function and, obviously, without regard to a reasonable relationship between the offense, the offender, and the function in question.[83] While the courts have been especially reluctant to interfere with these constitutional and statutory deprivations, there are a few signs that indicate the possibility of change.

In the absence of legislative revision, any challenges brought to the courts must first overcome an early decision by the Supreme Court, *Hawker* v. *New York*.[84] New York adopted a statute in 1893 which precluded from the practice of medicine anyone convicted of a felony. Hawker had been convicted of abortion many years before the passage of this law, and the present case arose on an indictment for the practice of medicine by an ex-felon. In the face of a strong *ex post facto* argument, the Court upheld the conviction and in the process articulated a broad base for state power:

> [The state] may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practice medicine, and, further, it may make the record of a conviction conclusive evidence of the violation of the criminal law and of the absence of the requisite good character.[85]

There is, however, ameliorative language in *Hawker* that, when bolstered with more recent decisions [86] and the alteration in our present concepts of federalism, provides a basis for challenging civil disability laws. The Court conceded that "in a certain sense such a rule is arbitrary" and could work harshly when an offender reforms and is "possessed of a good moral character." [87]

The California Supreme Court picked up the spirit of this language and recently decided the most important contemporary case in this area,

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[83] *Compare* Model Penal Code §306.1 (P.O.D. 1962); ALI Proceedings 286-326 (May 1961), *with* ABA, Uniform Law on Status of Convicted Persons.

[84] 170 U.S. 189 (1898).

[85] *Id.* at 191. To this view there is a strong dissent by Justice Harlan, *Id.* at 200.

[86] In Sherman v. United States, 356 U.S. 369, 375-76 (1958), a nine-year-old conviction for the illegal sale of narcotics and a five-year-old possession conviction were deemed insufficient to prove a current readiness to sell narcotics. The issue of readiness to sell arose in the context of a successful entrapment defense. In Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 243-46 (1957), the Court reversed New Mexico's holding that Schware was unfit to practice law because his political activities in the early 1930's involved the use of aliases, several arrests, and membership in the Communist Party. The Court suggested that there must be a rational connection between the past conduct and present fitness, a concept rejected by the *Hawker* majority.

[87] 170 U.S. at 196-97.

Otsuka v. *Hite*.[88] The question presented was whether bona fide conscientious objectors who pleaded guilty more than twenty years previously to a violation of the Selective Service Act could constitutionally be treated as persons convicted of an "infamous crime" and thus rendered ineligible to vote under the California constitution. The court reasoned that the only tenable purpose of the voting disqualification was to protect "the purity of the ballot box" against abuses by morally corrupt and dishonest voters.

The opinion took the view that:

> such abuses are not consistently predictable by simply considering "the nature of the punishment," in this day of indeterminate sentences and proliferation of technical, malum prohibitum offenses. Rather, the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed a threat to the integrity of the elective process.[89]

Although the state showed a compelling interest in maintaining electoral purity, the court did not agree that the registrar could preclude all ex-felons from voting. In holding the law unconstitutional as applied to these individuals, the court found it unreasonable to disenfranchise all felons and, after due inquiry into the nature of this offense, found no evidence that the individuals involved were "morally corrupt and dishonest."

No one seriously questions the states' power to impose some disabilities; nor does anyone question the limited utility of disabilities. The problem is with the indiscriminate and often irrational and self-defeating use of the power. The basic questions are: what disabilities may be imposed, by whom, and under what circumstances?

The solution proposed here requires that the various legislatures adopt concise legislation following the principle that *no civil or political right is to be lost unless the right is reasonably related to the nature of the offense and the function to be performed, or is required in the execution of the sentence.*[90] Thus a public official could be debarred from holding public office based on his conviction of an offense that involves a violation of the public trust. A mayor who is a convicted wife-beater, however, will simply have to face the judgment of the electorate. An individual who is convicted of an offense involving a serious violation of the election laws might be disenfranchised on the principle of "reasonable relationship" while someone else convicted of an unrelated offense and sentenced to prison could lose his vote but only on the principle that the execution of the sentence bars the way to the exercise of the function.[91]

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[88] 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

[89] *Id.* at 611, 414 P.2d at 422, 51 Cal. Rptr. at 294.

[90] "The present law on deprivation of civil rights of offenders is in most jurisdictions an archaic holdover from early times and is in contradiction to the principles of modern correctional treatment. . . . The law should provide that criminal disposition other than commitment to a penal institution, and such commitments as are revoked by the sentencing court in due course, shall not entail the loss by the defendant of any civil or political rights. If offenders are allowed to retain these rights, their rehabilitation is thereby furthered. Therefore there should be no loss of rights except where protection of the public is involved. The concept of civil death upon life imprisonment existing in certain jurisdictions should be abolished." NATIONAL PROBATION AND PAROLE ASSOCIATION, PAROLE IN PRINCIPLE AND PRACTICE, 136 (1957).

On the issue of how long a right should be lost, the principle underlying the deprivation provides a partial answer. A right lost because of its relationship to the nature of the offense may reasonably be treated differently than one lost simply for reasons of administrative convenience or, in the case of voting, fear of bloc voting in a prison community.[92] In the latter situation, automatic restoration commends itself, while in the former situation additional inquiry is required.

We might agree that conduct which undermines the electoral process deserves the additional punishment of disenfranchisement and is a supportable legislative determination. However, there is no need to delude ourselves with rhetoric about rehabilitative purposes, or competency, or the purity of the ballot box. For all we know, the offender may be highly interested and informed about politics and therefore capable of casting a pure and remarkably intelligent vote.

The disenfranchisement is frankly punitive and, as such, should endure as long as it serves some valid "purpose of punishment." No specific time need be stated here or at the time of sentence. The essential point is that no disability should be for life. The discussion of restoration and expungement will encompass this issue.[93]

If the approach to the loss of civil and political rights were more rational, we might proportionately reduce our concern about restoration and expungement procedures. In the present state of the law, it is understandable that there exists more concern for regaining rights — the problem normally rises as a crisis situation demanding an immediate answer — yet it is obvious that any reform that does not begin at the point of the loss is self-defeating.

Every jurisdiction has some means available to restore civil and political rights. The most common form is the discretionary and usually limited pardon granted by the governor or a board appointed by him. Pardons are episodic and operate only against the sanctions imposed.

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[91] Similarly justifiable is service on a jury or continuing in public office while imprisoned for an offense unrelated to violation of the public trust.

[92] *But see* Carrington v. Rash, 380 U.S. 89, 96 (1965).

[93] When conviction may operate to disqualify the offender from a profession or occupation, the individual is entitled to a fair hearing on the question of his competency to enter or continue in the field. Although conviction is an adequate ground to invoke an inquiry before the appropriate tribunal, there are few instances in which the conviction could be considered conclusive evidence of incompetency.

They do not operate against the conviction itself or remove the stigma of guilt. As Professor Gough points out,

> an expungment is . . . a legislative provision for the eradication of a record of conviction or adjudication upon fulfillment of prescribed conditions, usually the successful discharge of the offender from probation and the passage of a period of time without further offense. It is not simply a lifting of disabilities attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect.[94]

In dealing with restoration and expungement procedures, two different, although overlapping, objectives are involved. Restoration seeks to remove some of the disabilities associated with the conviction and in a formal way restore some of the incidents of citizenship. Here there is no special concern for first offenders, nor is an effort made to disguise the fact of conviction. Expungement laws, however, are uniquely concerned with the first offender,[95] and through a variety of techniques – sealing or destruction of records, setting aside the conviction, or annulment of the conviction – the effort is to disguise the fact of conviction. While civil and political rights are involved, the primary objective appears to be the social and economic reconstruction of the ex-offender. Ceremonially, it resembles a status elevation ceremony designed to allow the person to regain the status and anonymity of the ordinary citizen.[96]

Most people agree that the present law on civil disabilities is irrational and dysfunctional, that executive restoration procedures are of limited utility, that judicially supervised and some automatic restoration is needed, and that a form of expungement for some offenders is sensible. The problem, however, is the search for principle, criteria, and workable procedures.

When civil or political rights must be denied because of administrative convenience, then their restoration should be automatic when the reason for the denial ceases to exist. Thus the right to vote would be automatically restored to a prisoner when he is discharged or released on parole. If, as discussed earlier, the disenfranchisement is related to the nature of the offense – and what follows is true for all similar deprivations – then the ex-offender should be entitled to petition the court for a certificate of restoration.

Since the latter type of deprivation is either frankly punitive or designed to protect an important governmental interest, a probationary period prior to application should be required. If after, let us say, five years the ex-offender gives evidence that he has not committed any new offense and does not present any likelihood of committing a new offense, all disabilities would be removed.[97]

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[94] Gough, *supra* note 80, at 149.

[95] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL ACT FOR THE ANNULMENT OF A CONVICTION OF CRIME (1962) is not limited to first offenders. The Act has not yet been adopted anywhere.

[96] Gough, *supra* note 80, at 163-68, analyzes the statutes of California, Michigan, Minnesota, New Jersey, and Texas. For a more detailed discussion of the California law see Note, *The Effect of Expungement on a Criminal Conviction,* 40 SOUTHERN CALIFORNIA LAW REVIEW 127 (1967).

Expungement procedures, at least until more is known about how they operate, might well be limited to first offenders. The individual would file a simple petition with the court, after completion of sentence and a reasonable probationary period, requesting that all records in his case, including law enforcement and prosecution records, be ordered sealed by the court. The ex-offender, whether he is applying for employment, a bond, liability insurance, union membership, the military, or appearing in court as a witness, could only be asked: "Have you ever been arrested for, or convicted of, an offense which has not been annulled by a court?"

Should the ex-offender be applying for employment in a security-sensitive area or with a law enforcement agency, or attempting to gain admission to a profession wherein he would deal with other person's lives or property (*e.g.*, medicine or law), he might be asked the unadorned conviction question and, with his consent and only for use by the hiring-admitting authority, the records might then be made available.

Should the ex-offender be convicted of a new offense, then the prior expunged offense might be resurrected and used by the sentencing authority in determining an appropriate disposition. Correctional personnel would also have access to the records in this circumstance.

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[97] A conviction for a traffic offense or a petty misdemeanor should not prevent restoration. On the other hand, when the underlying offense is serious or, for example, there is evidence that the offender is participating in organized crime, a professional criminal, or, because of a continuing psychiatric disorder, remains capable of physical assault, the judge should exercise his discretion to deny restoration.

V. LEGAL NORMS AND THE JUVENILE CORRECTIONAL PROCESS*

The legal status of the juvenile justice system is currently in a state of profound change. For years the system was permitted by legislatures and courts to function with great informality and with immunity from the procedural requirements of the criminal system. To a large extent, that condition persists with respect to the dependency and neglect jurisdiction of the juvenile court; but with respect to delinquency jurisdiction – particularly delinquency predicated upon violation of a criminal statute – there is now a clear trend toward requiring conformity to procedural protections. Revisions of juvenile court acts and appellate court decisions have recently been responsive to a growing body of commentary urging greater legal protection for the suspected or adjudicated delinquent. Although change in legal status of the system has occurred primarily in juvenile court hearings and the adjudication decision, it has also affected prehearing proceedings and the juvenile correctional process. The juvenile justice system must be re-examined against this background of change.

Juvenile justice is a system separate from, though parallel to, the criminal justice system. Separation is established by statutes which give juvenile courts exclusive jurisdiction over persons under a specified age who are alleged to have committed criminal offenses.[1] Statutes substitute adjudication of delinquency for conviction of crime and provide that an adjudication does not create the civil disabilities that result from a criminal conviction.[2] Upon adjudication, the juvenile court's statutory powers of disposition include commitment to a juvenile correctional institution until the juvenile becomes 21 years of age, without regard to the seriousness or pettiness of the offense as measured by the sentence authorized upon conviction in criminal court.[3]

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* This Chapter prepared by Professor Robert Dawson of the University of Texas Law School.

[1] President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 4, (1967) hereafter referred to by title.

[2] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT §25 (6th ed. 1959) [hereinafter cited as STANDARD JUVENILE COURT ACT] provides:

> No adjudication by the court of the status of any child shall be deemed a conviction; no adjudication shall impose any civil disability ordinarily resulting from conviction; no child shall be found guilty or be deemed a criminal by reason of adjudication. . . . The disposition made of a child, or any evidence given in the court, shall not operate to disqualify the child in any civil service or military application or appointment.

[3] *Id.* §24.

Even more important than the differences created by legal structure are those that occur in the actual operation of the system.[4] Police investigation may be conducted by a special juvenile bureau of the police department rather than detective bureaus organized on the basis of offense categories, and the juvenile bureau may operate programs for the adjustment of cases without referral to juvenile court. Juveniles taken into police custody in some places are not photographed or fingerprinted. Juvenile police records may be kept separate from adult records with special restrictions on public access to them; furthermore, juvenile records in some places are not sent to state or national criminal identification centers.

Offenders referred to juvenile court may be detained before trial in a juvenile detention center rather than in a city or county jail. Although the juvenile offender may be denied an opportunity for release on bail, he may have greater opportunity than the adult offender for release without security. A preliminary determination as to whether the juvenile engaged in delinquent conduct may be made by a social worker in the juvenile court's intake department. Even when it is concluded that delinquency can be proved, the case may be informally adjusted without a juvenile court hearing.

In the criminal system, the prosecuting attorney's office may make a preliminary determination as to whether there is sufficient evidence of guilt to justify prosecution, and this decision may be reviewed in a brief judicial proceeding (preliminary examination or hearing) or by a grand jury, or both. Even if the prosecutor's office determines there is sufficient evidence of guilt to justify prosecution, it may conclude prosecution is not in the public interest and dismiss the case, conditionally or unconditionally.

As discussed earlier,[5] the adjudication of criminal cases is accomplished most frequently by a plea of guilty entered by the defendant as a result of negotiations between his attorney and a prosecuting attorney. The comparatively small number of "not guilty" pleas leads to contested trials. In the juvenile system, bargaining for guilty pleas is much less likely to occur, although the percentage of cases that are not contested by the defendant may be even greater than in criminal court. Despite full implementation of the *Gault*[6] requirements, the juvenile court hearing is likely to be more informal than the criminal trial, and a jury is far less likely to be present.

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[4] For descriptions of the juvenile justice system in operation, *see* TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, (1967); U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, POLICE WORK WITH CHILDREN (Children's Bureau Pub. No. 399, 1962); U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS (Children's Bureau Pub. No. 437, 1966); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARVARD LAW REVIEW 775 (1966).

[5] See pages 17-18, *supra*.

[6] See the discussion of *In re* Gault, *infra*.

If the defendant is convicted in criminal court, he is sentenced (normally by the judge, but in some jurisdictions by the jury); sentencing may be postponed to permit a presentence investigation into the offense and the defendant's background. After adjudication of delinquency in juvenile court, the judge normally consults a social history report in making his disposition. Unlike the presentence report in adult cases, the juvenile social history investigation may have been conducted before the juvenile court hearing and adjudication of delinquency. A juvenile is more likely to receive probation than an adult.

An adult sentenced to a correctional institution often must serve a specified length of time or percentage of his sentence before he becomes eligible for release on parole; a juvenile committed to a training school normally does not have statutory durational requirements to satisfy to become eligible for release. Furthermore, he is likely to be released earlier than his counterpart sentenced for a criminal offense.

A juvenile is likely to be confined in a minimum-security institution in which the daily routine consists of a mixture of academic education, vocational training, and maintenance of the institution. An adult offender is likely to be confined in a maximum- or medium-security institution with a daily routine of prison maintenance, prison industry work, and vocational training.

The corrections segment of criminal justice administration can be regarded as all the proceedings following conviction of crime except those challenging the validity of the conviction. The corrections segment of the juvenile justice system includes the same proceedings after adjudication of delinquency but also includes pre-adjudication stages. Many cases are finally disposed of in pre-adjudication stages without court hearing by staff who regard themselves as correctional personnel and who attempt to use correctional methods in making decisions. Pre-adjudication and post-adjudication decisions in juvenile corrections are discussed separately because the former presents some legal problems which the latter does not; however, the *Gault* decision raises problems for both.

Questions Raised by In re Gault

In re Gault [7] involved an adjudication of delinquency and a commitment of the defendant to a state training school for the duration of his minority. The Supreme Court held that in delinquency proceedings that may result in incarceration, the federal constitution requires observance of: 1. the right to counsel, including appointment of counsel for the indigent; 2. the right to notice of the charges; 3. the right to confrontation of witnesses; and 4. the privilege against self-incrimination.

The most important consideration for juvenile corrections of the

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[7] 387 U.S. 1 (1967).

Gault decision is its implications for the proceedings that occur both before and after the adjudication of delinquency. The Court limited its opinion to the adjudication stage of the juvenile process,[8] but it is difficult to contain the case within those limits. The Court seemed unwilling to speak to the implications of its decision until subsequent cases require it, although its failure to explore these broader implications does not indicate a failure to recognize them. It also seems likely that when these implications are fully explored in subsequent litigation, the Court will take the position that federal constitutional rights applicable to the criminal process, before and after trial, as well as at the trial, must be applied to the comparable stages of the juvenile process. Indeed, several state courts have taken that position in cases subsequent to *Gault*.[9]

Many of the legal norms applicable to the adult correctional process are based on the federal constitution. Examples are *Mempa* v. *Rhay*,[10] recognizing a federal constitutional right to counsel at sentencing and revocation of probation; *Ex parte Hull*,[11] recognizing a prisoner's federal constitutional right of access to court; and the cases defining the limits on the authority of prison officials imposed by the First Amendment.[12] *Gault* may be regarded as a conduit through which these constitutional norms are imposed on the juvenile correctional process.

For the pre-adjudication stages of the juvenile justice system, *Gault* would seem to require observance of the *Miranda* [13] standards in police interrogation. Moreover, several courts have interpreted the decision to require observance of the rules of search and seizure and the exclusionary rule of enforcement used in criminal cases.[14] *Gault* can also be interpreted to require observance of the right to a speedy trial in juvenile cases to the same extent it is required in criminal cases.[15]

Juvenile Corrections Prior to Adjudication

In the juvenile justice system, correctional personnel function before as well as after adjudication, while in the criminal justice system the correctional process is more clearly confined to post-adjudication stages. The extension of juvenile corrections into the pre-adjudication phase of the system raises some difficult legal questions. Two of the most significant issues have been isolated for discussion here: the informal adjustment of delinquency cases by intake department workers; and the implications for juvenile correctional personnel of the discretionary waiver of juveniles to criminal court for prosecution.

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[8] *Id.* at 13: "[W]e are not here concerned with the procedures or constitutional rights applicable to the prejudicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process."

[9] *E.g., In re* Urbasek, 38 Ill. 2d 535, 541-42, 232 N.E.2d 716, 719-20 (1967); Collins v. State, 429 S.W.2d 650, 652 (Tex. Civ. App. 1968).

[10] 389 U.S. 128 (1967). Discussed on pages 35-37, *supra*.

[11] 312 U.S. 546 (1941).

[12] See pages 42-44, *supra*.

[13] Miranda v. Arizona, 384 U.S. 436 (1966).

[14] *E.g., In re* Marsh, 39 Ill. 2d 621, 624, 237 N.E.2d 529, 531 (1968); State v. Lowry, 95 N.J. Super. 307, 322, 230 A.2d 907, 914-15 (1967).

[15] The Sixth Amendment right to a speedy trial was applied to state criminal proceedings in Klopfer v. North Carolina, 386 U.S. 213 (1967).

Intake Screening and Informal Adjustment

As previously indicated, one of the salient features of the juvenile justice system is the pre-judicial screening of cases by correctional personnel and the very large number of cases – in some places over half of those referred to the court – thereby disposed of without judicial participation.[16] Although a number of rationales have been advanced in support of this practice, the fact is that there are simply not enough juvenile court judges in metropolitan areas to dispose of the volume of cases referred to the court by the police. The necessity for informal adjustment is likely to remain, therefore, unless there is a substantial reduction in police referral rates, a great increase in the number of juvenile court judges, or much greater efficiency in juvenile court adjudication and disposition processes.

Perhaps the most important problem arising from pre-adjudication correctional screening is determining whether the juvenile court would have authority to act if a petition for a court hearing were filed. Some elements of this determination are relatively easy to make, such as whether the defendant's age places him within the jurisdiction of the juvenile court, or even whether the allegations of misconduct, if true, constitute delinquency. A more difficult decision is what investigation or inquiry should be employed to determine whether there is evidence to support the allegations of misconduct. In many instances these evidentiary questions are handled by seeking an admission from the defendant that the allegations in the complaint are true. Indeed, in some courts, informal adjustment is available only if the defendant admits the allegations of the complaint, no matter how clear the evidence appears.[17] Denial of the allegations results automatically in a decision to file a petition for a court hearing. While there may be valid correctional purposes in seeking an admission of guilt – counselling or other corrective measures may be impossible or inappropriate in face of assertions of innocence or without resolving the issue – the confession-seeking process does raise difficult legal problems on several levels.

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[16] For discussions of intake screening and informal adjustment practices, *see* Sheridan, *Juvenile Court Intake,* 2 Journal of Family Law 139 (1962); Tappan, *Unofficial Delinquency,* 29 Nebraska Law Review 547 (1950); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice,* 79 Harvard Law Review 775 (1966); Note, *Informal Disposition of Delinquency Cases: Survey and Comparison of Court Delegation of Decision-making,* 1965 Washington University Law Quarterly 258.

[17] Standard Juvenile Court Act, *supra* note 2, at §12 authorizes informal adjustment "provided that the facts appear to establish prima facie jurisdiction and are admitted, and provided that consent is obtained from the parents and also from the child if he is of sufficient age and understanding."

A major problem is whether this process yields reliable information; confessions of juveniles are often unreliable,[18] at least when they are obtained by police interrogation, it has been said. In addition, since the intake conference almost never involves participation by counsel for the juvenile,[19] there is a substantial question whether the juvenile has the information necessary to assess accurately his own guilt or innocence. For example, he may have a valid defense to the allegations of the complaint but fail to relate it due to ignorance. Even if he does relate information that constitutes a defense, whether the intake worker has the knowledge needed to assess its legal significance is in doubt.

There are, of course, other values to be protected by requiring a confession to be voluntary quite apart from any doubts about its reliability, and whether the intake process yields confessions that are in any sense voluntary is questionable. Because informal adjustment normally has substantial advantages for the juvenile, the incentive to confess is great. The significance of confessing may be expressly communicated to the juvenile, but even if it is not, the juvenile is likely to sense that it will inure to his benefit to "cooperate" with the intake worker.

The perceived advantages in "cooperating" with the intake worker, the immaturity of the juvenile defendant, and the absence of independent adult counsel and support, all cast doubt upon the voluntariness of admissions of guilt obtained during the intake interview process.[20]

Since the federal constitutional privilege against self-incrimination applies to juvenile delinquency proceedings,[21] the intake process must be measured against that standard as well. It is likely that an intake conference confession must meet the constitutional standards applicable to police interrogation[22] in order to be admissible at a juvenile court adjudication hearing. Even if an intake confession is not used at a juvenile court hearing, sound policy would indicate that steps should be taken to protect the juvenile's privilege against self-incrimination during the intake conference. This, in turn, raises the very difficult question of the capacity of an uncounseled juvenile to waive his privilege against self-incrimination.[23]

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[18] In *In re* Four Youths, 89 Wash. L. Rptr. 639 (1961). Judge Orman W. Ketcham, of the District of Columbia Juvenile Court, refused to admit confessions of juveniles into evidence, commenting, "Simply stated, the Court's decision in this case rests upon the considered opinion – after nearly four busy years on the Juvenile Court bench during which the testimony of thousands of such juveniles has been heard – that the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth."

[19] *See* Rosenheim & Skoler, *The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings*, 11 CRIME AND DELINQUENCY 167 (1965).

[20] Voluntariness, apart from protection of the privilege against self-incrimination, would be determined in accordance with the totality-of-the-circumstances approach used by the Supreme Court to determine voluntariness of confessions obtained during policy in-custody interrogation of persons suspected of crime. *See* Haynes v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Haley v. Ohio, 332 U.S. 596 (1948).

[21] *In re* Gault, 387 U.S. 1 (1967).

[22] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

It may be argued that a police report coupled with an intake confession should be sufficient evidence of the court's jurisdiction to permit the intake worker to adjust the case informally. After all, the juvenile has much to gain by informal adjustment in face of the alternative of a formal court petition, and there seems little institutional purpose to be served in a juvenile court hearing when the disposition almost certainly will be probation. However, the consequences of the intake worker's administrative determination of guilt are not confined to that single instance. The informal adjustment is recorded in the juvenile's court file. Should the juvenile again be referred to the court, his file is used to determine: whether informally to adjust the case or file a court petition; whether the juvenile court judge should transfer the case to criminal court; or whether upon adjudication of delinquency the juvenile should be placed on probation or committed to a juvenile correctional institution. The recorded prior informal adjustments are often taken fairly automatically as proof of the alleged underlying misconduct. In any event, except for proceedings to transfer a case to criminal court,[24] there is likely to be little opportunity for the juvenile later to challenge the accuracy of the record or the reliability of the admissions as indications of misconduct. Thus, the uses made of the court record of informal adjustments, as well as the process of compiling the record, lend themselves to the very real possibility of erroneous attribution of misconduct, with its substantial prejudicial effects.

The practice of informal adjustment has important legal implications, even in cases in which the court's jurisdiction is reliably and properly determined. The sole sanction to secure acceptance of the disposition by the juvenile and his family is threat to file a formal court petition. Yet because that sanction is, in effect, a delay in the adjudication of the case, it presents difficult problems of conformity to the juvenile's right to a speedy trial. Although it may not occur frequently, it is easy to conceive of situations in which the delay in filing the petition, due to an unsuccessful effort informally to adjust the case, substantially prejudices the juvenile's ability to defend himself. In such a case, the juvenile could not constitutionally be adjudicated a delinquent.[25] However, because the constitutionality of such a delay depends upon its duration and the occurrence of events that enhance prejudice, it cannot be known at the time of informal adjustment whether a petition can constitutionally be pursued at some later date. In that sense, then, there is an element of bluff in using the possibility of filing a petition to sanction the informal adjustment process.

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[23] *Miranda* requires the police to warn a suspect before interrogation that he has a right to remain silent, that anything he says can be used in court, that he has a right to an attorney and that if he wants counsel and is indigent, an attorney will be provided for him. *Miranda* permits the suspect to waive these rights and subject himself to interrogation. The case, dealing with the criminal process, obviously contemplates that the suspect is an adult. Whether *Miranda* standards, without more, would be adequate to protect a juvenile's privilege against self-incrimination and right to counsel is problematical. In *Gault*, the Court anticipated this problem, but did not attempt to resolve it: "We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents." 387 U.S. at 55.

[24] Kent v. United States, 383 U.S. 541 (1966) may require disclosure of the juvenile court record to the attorney for the juvenile in event of proceedings to waive juvenile court jurisdiction.

Another important problem is the uncontrolled discretion possessed by the intake worker in informally adjusting cases. Generally, only cases in which he decides to file a court petition are assured of judicial review. There are normally few guidelines for him in making the disposition decision, including its duration and conditions. The use of improper conditions in this process has been documented.[26] The control of discretion problem is substantially the same as it is at other stages in the criminal and juvenile systems in which broad administrative discretion is exercised.[27]

Waiver of Jurisdiction and the Requirements of Kent

Juvenile court statutes almost universally permit waiver of jurisdiction and transfer of certain delinquency cases for prosecution in criminal court. Authority to make the waiver decision is normally placed in the juvenile court judge; he is expected to exercise discretion on a case-by-case basis. Although the number of juvenile cases actually waived to criminal court is quite small, they are of course critical to the juveniles and communities involved.

In *Kent* v. *United States,*[28] the Supreme Court held that if a juvenile's court file is used by the judge in deciding whether to waive jurisdiction to the criminal court, the juvenile's attorney must be given an opportunity to examine the file and to challenge its reliability. Several state courts have interpreted *Kent* as setting federal constitutional standards that are applicable in state juvenile waiver proceedings.[29] In such a jurisdiction, the records of informal adjustments, police complaints, and contacts between juvenile probationer and probation officer are open to challenge should the waiver question be considered by the juvenile court.

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[25] This assumes that the Sixth Amendment right to a speedy trial, applied to state criminal proceedings in Klopfer v. North Carolina, 386 U.S. 213 (1967), would be applied to delinquency proceedings through *Gault.*

[26] For example, in Note, *Informal Disposition of Delinquency Cases: Survey and Comparison of Court Delegation of Decision-making,* 1965 WASHINGTON UNIVERSITY LAW QUARTERLY 258, 224, instances are reported in which informal adjustments were conditioned upon the juvenile's attending church for a specified period of time.

[27] For example, see the discussion of controlling police discretion in LaFave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 153-64 (1965).

[28] 383 U.S. 541 (1966).

Since it is virtually impossible to predict which juveniles later will be considered for waiver to a criminal court, all juvenile court records are potentially subject to challenge in subsequent waiver hearings. This prospect should lead to greater care in compiling the juvenile court file, since intake workers and probation officers are understandably reluctant to have their records proved incorrect in a hearing before the juvenile court judge. As a matter of sound administrative policy, all entries in juvenile court files should be made with this potential accountability in mind.

Post-adjudication Juvenile Correctional Process

Despite obvious and important differences between the adult and juvenile correctional processes, there are a number of similarities in the types of decisions made. To some extent, these similarities are obscured by terminology employed by juvenile system personnel to underscore the differences. For example, an adult is sentenced to prison, while a juvenile is committed to training school; juvenile probation is sometimes called supervision or court supervision; an adult is paroled, a juvenile is released from training school on aftercare status; adult probation is revoked, juvenile court probation is modified; adult parole is revoked, a juvenile on aftercare is simply returned to the training school. Although the words are different, the consequences for the individual and community are the same. The decision-makers use similar criteria and employ similar procedures. Therefore, much of what was said in the preceding chapters about legal norms in adult corrections applies without significant modification to the comparable stages in juvenile corrections. However, some stages in juvenile corrections lack an identical counterpart in the adult process, and it is upon those stages that this discussion concentrates.

Appellate Review of Juvenile Court Dispositions

It is common to observe that the juvenile offender, as compared with his adult counterpart, has few legal rights and protections. He is largely under the control of the juvenile court judge acting in his discretion without significant legal limitations. As a result of the *Gault* decision, constitutional procedural protections must now be observed in juvenile court, much as they are required in criminal court. In appellate court review of sentencing, however, juveniles have always in a sense enjoyed more legal protection than adults. Appellate courts traditionally have taken the view that they lack the power to review criminal court sentences that are within limits authorized by statute, reasoning that those decisions are discretionary and final with the sentencing judge.[30] By contrast, reluctance to review sentencing never was firmly established in the juvenile system.

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[29] *E.g., In re* Harris, 67 Cal. 2d 876, 878-79, 434 P.2d 615, 617, 64 Cal. Rptr. 319, 321 (1967); Steinhauer v. State, 206 So. 2d 25, 27 (Fla. App. 1967).

Although one can find statements about giving deference to the disposition made by the juvenile court judge in the exercise of his discretion, appellate courts have not taken the position they lack power to review a juvenile court disposition that is within statutory limits. In fact, in a number of cases appellate courts have reviewed juvenile court dispositions and have reversed them, while holding that the adjudication of delinquency was proper. Most are cases in which a juvenile was committed to training school for noncriminal or petty criminal conduct.[31] In reversing commitments, some appellate courts have relied upon statutory language expressing a preference for keeping the child in his home or at least in his community.[32]

There is little recognition that what they are doing is identical to appellate court review of sentencing in criminal cases. As a consequence counsel often is not aware of the availability of "disposition review" by an appellate court, making the erroneous assumption that, as in criminal cases, the disposition is nonreviewable if within statutory limits. It would be misleading to imply that this power has been used frequently in juvenile cases; after all, until recently appeals were rare events in the juvenile justice system. However, with the increasing involvement of lawyers in the juvenile process[33] appeals probably will increase in number, and disposition review will be undertaken with greater frequency.

In many juvenile cases there is little question about the authority of the court to assume jurisdiction – it can be proved that the defendant engaged in prohibited conduct. Assuming the propriety of the legislative proscription, the difficult question is what should be done with the juvenile. Statutes grant juvenile courts broad discretion in making the disposition decision, but the availability of appellate court review of this decision poses a substantial check upon that authority. If this check were invoked more frequently, it might lead to more careful disposition proceedings, especially to more careful exploration of community alternatives to institutional confinement.

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[30] The best discussion of appellate court review of criminal sentences appears in American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tent. Draft 1967).

[31] *E.g., In re* Cromwell, 232 Md. 409, 414, 194 A.2d 88, 90 (1963); *In re* Braun, 145 N.W.2d 482, 487 (N.D. 1966); State v. Myers, 22 N.W.2d 199 (N.D. 1946). *But see In re* Lewis, 11 N.J. 217, 224, 94 A.2d 328, 332 (1953) (asserting lack of power to modify disposition if within statutory limits).

[32] Standard Juvenile Court Act, *supra* note 2, at §1, uses language that appears in many juvenile court acts: "This Act shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance, and control that will conduce to his welfare and the best interests of the state. . . ."

[33] As a result of the *Gault* decision, counsel must be provided for the indigent at the adjudication stage of delinquency proceedings. *See* text accompanying note 7 *supra*. Douglas v. California, 372 U.S. 353 (1963) requires provision of counsel to assist a convicted criminal offender in his appeal. Although the specific issue has not been faced, the rationale of the *Douglas* case would seem to apply to an appeal from an adjudication of delinquency.

Commingling of Juveniles with Adults

One of the most important objectives of the juvenile court movement was the removal of juveniles from the criminal justice system. Their physical separation from adults during pretrial detention and also the provision of separate correctional institutions was contemplated. The concern involved protecting juveniles from physical assault by adults and from the attitudes of hardened criminals as well as providing them with facilities and programs specially adapted to their needs.

The contemplated total separation of juveniles from criminals has not been realized. Most metropolitan areas have separate detention centers for juveniles accused of delinquency, but in less populous areas the juvenile detention center is likely to be simply a wing or series of cells in the county jail. Even in metropolitan areas, juveniles may not be separated from adults during police processing prior to referral to the juvenile detention center. Furthermore, although separate juvenile correctional institutions have generally been provided, in a number of states juveniles in training schools may be transferred to adult correctional institutions. Indeed, in a few states juveniles can be directly committed to adult institutions.

The reasons for the failure are largely economic; few question the validity of the objective. As in other areas of the operation of the juvenile justice system, society's failure to provide the resources necessary for implementation of the system's goals creates or aggravates difficult legal problems. Few are more difficult than the legal implications of commingling practices.

The pretrial detention of juveniles in adult facilities is largely, although not exclusively, a rural phenomenon. In rural areas, commingling reflects the social and economic judgment that the volume of delinquency cases is not sufficient to justify separate facilities and staff.[34] Some juvenile court statutes appear to authorize such practices, when necessary, asking only that juveniles be kept as separate as possible from adults.[35] Others do not speak to this type of commingling.

Two general approaches to solution of this problem have been taken. One suggests the establishment of regional detention centers to serve large, but sparsely populated, geographic areas.[36] Obvious problems of transportation and access of the juvenile's family to him are presented by that proposal. A second approach, that more juveniles be released from custody prior to court hearing,[37] suggests not only that detention with adults is harmful but that in many cases detention of any kind is unnecessary.

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[34] U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 114-15 (Children's Bureau Pub. No. 437, 1966).

[35] For example, Ill. Ann. Stat. ch. 37, §702-8(1) (Smith-Hurd, Supp. 1967) provides: "No minor under 14 years of age may be confined in a jail or place ordinarily used for the confinement of prisoners in a police station. Boys under 17 and girls under 18 years of age must be kept separate from confined adults and may not at any time be kept in the same cell, room, or yard with adults confined pursuant to the criminal law."

A Children's Bureau study of post-adjudication confinement reports that "an average of about 478 children per year were transferred by State training schools for juvenile delinquents to penal institutions in the period 1959-61."[38] The study reports that transfer occurs "in over one-half of the states of the United States, the Federal System, and the District of Columbia."[39] Such transfers are authorized by statute in almost all of these jurisdictions. The reason for transfer almost always is misbehavior by the juvenile in the training school, which may range from failing to cooperate with training school authorities to commission of a dangerous offense.

Several cases have held that transfer of juveniles to adult correctional institutions violates the federal constitution.[40] The rationale of these cases is that to transfer juveniles who have not been afforded the constitutional protections surrounding one accused of crime to institutions primarily for the care and custody of persons convicted of crime, is a violation of due process of law. This procedure is just as much a denial of due process, it is asserted, as sentencing an adult to a reformatory or penitentiary without full constitutional procedures. If in fact the *Gault* case holds, as some courts appear to interpret it,[41] that juveniles must now be provided with the full constitutional protections afforded adults in the adjudication of their cases, then, ironically, this argument loses much of its cogency. While it is true that statutes may still declare that an adjudication of delinquency shall not constitute a conviction of crime,[42] to be consistent with the *Gault* philosophy[43] courts should disregard the statutory labels and hold that juveniles adjudicated delinquent in compliance with *Gault* have been afforded all the protections of those accused of crime. Of course, the argument still remains that transfer is inconsistent with the avowed purpose of juvenile court legislation, but it is difficult to attach much effect to that argument in jurisdictions where administrative transfer specifically is authorized by statute.

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[36] *See* National Council on Crime and Delinquency, Standards and Guides for the Detention of Children and Youth 145-56 (2d ed. 1961).

[37] *Id.* at 11-31.

[38] U.S. Department of Health, Education, and Welfare, Delinquent Children in Penal Institutions 6 (Children's Bureau Pub. No. 415, 1964) [hereinafter cited as Delinquent Children in Penal Institutions].

[39] *Id.* at 1.

[40] *E.g.*, White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954); *In re* Rich, 216 A.2d 266, 269-70 (Vt. 1966). For a brief discussion of the relevant cases, *see* Delinquent Children in Penal Institutions, *supra* note 38, at 10-20.

[41] *See* note 9 *supra*.

[42] *See* note 2 *supra*.

[43] In *Gault* the Court concluded that the same interests — protection of society and deprivation of an individual's liberty — were involved in both criminal and delinquency cases and that merely labeling delinquency cases "civil" did not insulate them from constitutional protections required in criminal cases. 387 U.S. at 12-31.

Again, economics underlie much of this problem. Juveniles who are transferred involve such a small percentage of the total training school population, and such a small number of persons in an absolute sense, as to make it very difficult for a state to provide a separate institution for them – separate from both the normal training school and the adult reformatory for young offenders. Furthermore, the availability of transfer to another institution may be necessary to maintain discipline within the training school.

The transfer problem appears to involve labels rather than substance. Since there appears to be little objection to a separate maximum-security institution for problem juveniles, the actual objection may be that the receiving institution also houses persons convicted of crime, although they are usually approximately the same age and size as the transferred juveniles. In most transfers the receiving institution is one especially designated for young adult offenders – usually a reformatory – rather than a penitentiary.

Perhaps the constitutional arguments against any transfer have been misplaced. Absent any definitive ruling by the Supreme Court, there is room to explore the problem of the constitutional limitations that should surround the procedures and criteria used in the transfer process. At the present time transfers are being accomplished with a minimum of formality – in some instances without even an informal administrative hearing at which the juvenile is given an opportunity to speak.[44] It is perfectly reasonable to argue that although the constitution does not prohibit transfers altogether, it does require that they be accompanied by procedures designed to assure careful and deliberate decision-making because transfer from a minimum-security training school to a medium- or maximum-security reformatory will have a considerable impact on the daily life of the juvenile. The same administrative protections should then surround transfer from an open to a closed institution, even when both are exclusively for juveniles.

Right to Adequate Treatment

Society's failure to furnish the resources necessary to fulfill the juvenile system's goal of providing specialized care and treatment for delinquent children was an important reason for the Supreme Court's decision in *Gault*.[45] Similar deficiencies exist in the resources allocated for the care and treatment of the mentally ill; that is, the public mental hospital often is so inadequately staffed that it performs primarily a custodial function.[46] As part of the movement to provide more effective mental health systems, a legal right to treatment was developed. Most tersely put, the right-to-treatment doctrine asserts that since mental illness is the only justification for compulsory hospitalization, the state is enitled to retain patients in custody only if it is making an effort to treat their mental illnesses.

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[44] DELINQUENT CHILDREN IN PENAL INSTITUTIONS, *supra* note 38, at 7: "Most of the institutions reported that when a child's case is being reviewed or considered for possible transfer to a penal institution, the child is informed of the reasons for the committee's decisions and in most instances is given an opportunity to present his side of the case. The six institutions that do not inform the child of the reasons for the committee's decisions do not give the child an opportunity to present his side of the case."

In *Rouse* v. *Cameron*,[47] the United States Court of Appeals for the District of Columbia Circuit reviewed the case of one who had been committed to Saint Elizabeth's Hospital for an indeterminate term following a judgment of not guilty by reason of insanity on a charge of carrying a dangerous weapon.[48] Rouse alleged he was receiving inadequate treatment. The court explored the considerable constitutional problems raised by that allegation, but instead of basing a right to treatment on those grounds, it chose to base the decision on a statute governing hospitalization of the mentally ill in the District of Columbia. The statute read:

> A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment. The administrator of each public hospital shall keep records detailing all medical and psychiatric care and treatment received by a person hospitalized for a mental illness and the records shall be made available, upon the person's written authorization, to his attorney or personal physician.[49]

The court concluded that whether Rouse was receiving adequate treatment was a question that had not been explored by the trial court. The case was remanded for a determination of that issue, and the trial court was instructed that if Rouse was not receiving adequate treatment, it should either order his release or "allow the hospital a reasonable opportunity to initiate treatment." [50]

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[45] 387 U.S. at 12-31 (1967). *See* Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME AND DELINQUENCY 97 (1961).

[46] *See* Birnbaum, *The Right to Treatment*, 46 AMERICAN BAR ASSOCIATION JOURNAL 499, 500 (1960). See the discussion at pages 5-7, *supra*.

[47] 373 F.2d 451 (D.C. Cir. 1966).

[48] Had Rouse been convicted of the charge, he would have been subject to a maximum imprisonment of one year. *Id.* at 452.

[49] *Id.* at 453-54.

[50] *Id.* at 458. On remand the trial court apparently again refused to consider Rouse's inadequate treatment claim. On appeal from this decision, the Court of Appeals ordered him released from the criminal insanity commitment, but on grounds other than inadequacy of treatment. Rouse v. Cameron, 387 F.2d 241, 245 (D.C. Cir. 1967). Even then Rouse may not have actually been released, since the order releasing him from custody under the insanity commitment was "conditioned upon giving the Government a reasonable opportunity to institute civil commitment proceedings if it wishes." *Id.*

The right to treatment announced in *Rouse* v. *Cameron* in the context of a criminal commitment following an acquittal by reason of insanity has since been applied in other mental health or quasi-mental health contexts: commitment of sexual psychopaths,[51] commitment of an incompetent to stand trial for criminal charges,[52] and civil commitment of the mentally ill.[53]

The right to treatment announced in *Rouse* was based on an Act of Congress applicable only to the District of Columbia. The court stated, however, that in the absence of a statutory right to treatment there would be "serious constitutional questions" [54] about compulsory commitment of persons acquitted of crime by reason of insanity. Most significantly, the court seemed to imply that it would have found a constitutional right to treatment if the statutory right had not been found to exist.[55] Indeed, other courts have regarded the right to treament as a constitutional right.[56]

Treatment complaints in reported appellate opinions all have involved the institutions' failure to provide psychiatric services. The legal procedure is for the patient to file a petition for writ of habeas corpus alleging he is unlawfully held in custody because of inadequate treatment for his illness. In a hearing on the petition, the trial court determines what treatment, if any, the patient has received. It then determines from expert medical testimony and from medical literature what treatment the patient should be receiving for the illness. If it finds the treatment received is inadequate by those standards, it must order the patient's release or permit the hospital a reasonable time to initiate adequate treatment. It is no defense to an allegation of inadequate treatment that the hospital does not have the resources to provide adequate treatment for all its patients.[57] Difficult problems arise when the patient has refused treatment, especially when his refusal may be a product of his mental illness.[58]

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[51] Millard v. Cameron, 373 F.2d 468, 472-73 (D.C. Cir. 1966). *See* Miller v. Overholser, 206 F.2d 415, 419 (D.C. Cir. 1953).

[52] Nason v. Superintendent of Bridewater State Hospital, 233 N.E.2d 908, 913 (Mass. 1968).

[53] Dobson v. Cameron, 383 F.2d 519, 521 (D.C. Cir. 1967).

[54] 373 F.2d 451, 455 (D.C. Cir. 1966). It had previously been argued that a right to treatment can be based on due process of law. *See* note 46 *supra*.

[55] The court considered constitutional attacks based on due process of law, equal protection of the laws and cruel and unusual punishment. 373 F.2d at 453. It is common for courts to interpret statutes liberally in order to avoid constitutional problems. For example, in Kent v. United States, 383 U.S. 541, 552-54 (1966), the Supreme Court read important procedural protections into the District of Columbia Juvenile Court Act provisions dealing with waiver of jurisdiction to criminal court; otherwise, the Court would have been required to face directly difficult constitutional questions.

[56] Eidinoff v. Connolly, 281 F. Supp. 191, 198 (N.D. Tex. 1968); Nason v. Superintendent of Bridewater State Hospital, 233 N.E.2d 908 (Mass. 1968).

[57] Rouse v. Cameron, 373 F.2d 451, 457-58 (D.C. Cir. 1966).

This brief discussion of the right-to-treatment doctrine [59] indicates its potential applicability to the juvenile justice system. In *Creek* v. *Stone* [60] a juvenile detained in the District of Columbia Receiving Home for Children, who was awaiting adjudication of his case by the juvenile court, filed a petition for habeas corpus alleging: that he was in need of psychiatric treatment; that he requested the juvenile court to provide treatment; and that the juvenile court refused his request without a hearing. The district court denied the petition, but on appeal the United States Court of Appeals for the District of Columbia Circuit held that the juvenile court's refusal to consider the petitioner's treatment claim violated the following section of the District of Columbia Juvenile Court Act:

> [W]hen the child is removed from his own family, the court shall secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents.[61]

The court decided the juvenile court should have considered the petitioner's request for treatment and should have ordered treatment or his release if it determined there was a need for treatment that was not being satisfied.[62] In a later case, the reach of the doctrine was expanded to apply to psychiatric treatment in an institution to which a juvenile was committed following adjudication of delinquency.[63]

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[58] This problem was presented in the *Rouse* case: "There was evidence that appellant voluntarily left group therapy several months before the hearing below. But there was no inquiry into such questions as the suitability of group therapy for his particular illness, whether his rejection of this therapy was a manifestation and symptom of his mental illness, and whether reasonable efforts were made either to deal with such rejection or to provide some other suitable treatment." *Id.* at 459. In Eidinoff v. Connolly, 281 F. Supp. 191, 199-200 (N.D. Tex. 1968), the trial court concluded the patient was receiving adequate treatment even though he withdrew from group therapy and was receiving only occupational therapy.

[59] For a more detailed discussion, *see* Note, *The Nascent Right to Treatment*, 53 VIRGINIA LAW REVIEW 1134 (1967).

[60] 379 F.2d 106 (D.C. Cir. 1967).

[61] *Id.* at 109.

[62] Although the court clearly applied the right-to-treatment doctrine to the juvenile system, the case had become moot because the juvenile court had adjudicated the petitioner a delinquent and had committed him to the National Training School before the Court of Appeals decided the case. In two previous cases, petitioners had attempted to raise the right-to-treatment issue, but in both instances the cases were mooted when the juvenile court adjudicated them delinquents. *See* Clayton v. Stone, 358 F.2d 548 (D.C. Cir. 1966); Elmore v. Stone, 355 F.2d 841 (D.C. Cir. 1966).

[63] *In re* Elmore, 382 F.2d 125, 127 (D.C. Cir. 1967).

Since many juvenile court statutes have provisions similar to the one quoted above,[64] the *Creek* case has considerable potential for application outside the District of Columbia. As a constitutional doctrine, however, the right to treatment is perhaps on weaker grounds in the juvenile area than when applied to compulsory hospitalization of the mentally ill. Unlike compulsory hospitalization, the basis for intervention in delinquency cases is not that the individual is mentally ill or mentally ill and dangerous; the juvenile court can and does intervene solely to protect the public from the offending juvenile.

But on a different level, the implications of the right to treatment cases for both the juvenile system and the adult correctional process seem significant. To the extent that the use of legal authority or discretion in the administration of either system is justified by the assumption that it is needed in order to make treatment decisions, it may be appropriate to inquire whether treatment is in fact being provided. Although the right to treatment cases all have involved psychiatric treatment, there seems no logical reason why the doctrine must be confined to that form of treatment. For example, it is not impossible that some day there may develop a legally enforceable right for one in the juvenile or adult correctional process to the services of a competent probation or parole officer or institutional caseworker with a reasonable caseload.

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[64] The Standard Juvenile Court Act, a common model for state juvenile court legislation, provides that when the juvenile "[I]s removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him." STANDARD JUVENILE COURT ACT, *supra* 2, at §1. Compare to text at note 61 *supra*.

VI. CONCLUSION

For too long the agencies of corrections have been enamoured by their own rhetoric, and for too long the agencies of law have succumbed to it. A legal system that attempts to reflect the stated goals of corrections – the "cure" or social reintegration of the offenders – is simply out of touch with the ideology, practices, and resources available to corrections. The notion that a benevolent or humanitarian purpose must necessarily cede a vast discretion to those who are in authority is highly questionable when such purpose actually is pursued; it is indefensible when that purpose is pure fiction.

We have established the fact that after the pronouncement of guilt, the offender is ushered into a procedural no man's land. Abetted by vague or nonexistent statutes and a reluctance by the courts to interfere, sentencing and correctional authorities have been free to fashion their own notions of justice. The call for a due process approach to corrections is being heard, and there are clear signs that change is inevitable. The procedural devices of notice, hearing, and legal counsel are increasingly being urged – or employed – in order to produce visibility and accountability where now it does not exist; to seek reliability in fact-finding and rationality in conclusions; and to correct the abuses that are inherent in the mass processing of offenders.

Throughout this work a preference – although not much hope – has been expressed for the legislative solution. Persons concerned with law reform have learned that reformative legislation is far more likely when a model law exists. To my knowledge, not only is there no comprehensive legislation on the books, but there is nothing available in the nature of a Model Code of Correctional Procedure.

The Model Penal Code of the American Law Institute does contain sections that deal with virtually all of the areas that the proposed Code should encompass. Indeed, in at least one respect it goes further by setting out the organization of correctional agencies and services. Although the Model Penal Code should be viewed as an important beginning, its organization – the relevant sections are scattered through its 346 pages – and some of the positions it takes – no right to counsel in proceedings to revoke parole – make it far from satisfactory.

While the Code has stimulated penal code reform in this country and exerted a powerful influence in the form and content of recent revisions, it has scarcely caused a ripple in the area of our concern. Part of the reason for this seems to be its organization and the fact that penal code revisions generally tend to ignore procedural issues in deference to the existence of a separate code of criminal procedure. Since the latter kind of codes rarely address the issues dealt with in this work, the result is a built-in gap in law reform efforts.

The work of the American Bar Association's Project on Minimum Standards for Criminal Justice, the model acts promulgated by the National Council on Crime and Delinquency and the American Correctional Association, the current work on legislative revisions in the states of California and Washington, along with the Model Penal Code, could form the nucleus of a Model Code of Correctional Procedure.

The difficult task of preparing a Model Code cannot by itself be viewed as a panacea. Obviously, the pragmatic problems of underfinancing, undertraining, and understaffing of corrections remain; as well as the conceptual problems of inadequate theory and confusion of objectives. However, no code that has a chance for success is drafted in monastic seclusion or arrived at by inspiration or pure deduction. The discipline required to draft a comprehensive and innovative code forces the draftsman to face such problems as existing resources and conceptual confusion – and, in this area, problems associated with the organization and structure of correctional agencies.

Take the problem of disclosure of presentence reports. In a jurisdiction where presentence reports are rarely, if ever, prepared, the battle over disclosure obviously is anticipatory. Yet, the lawyer-draftsman's inverted introduction to the presentence report can force him to bore through the issues, eventually to discover the mission and reason – normally economic – for the nonuse of the report. In the process, the legal arguments over disclosure may reappear as a legislative proposal mandating the use of presentence reports with procedural rules governing their disclosure.

The same potential runs through every area that the proposed Code would regulate. Judges and parole boards will argue that they are too busy to give each case much attention. Prison administrators will argue that, if brutality exists, it is because of overcrowding and lack of program. Field officers will say that, if they must exercise more care in preparing cases for revocation proceedings, they simply will not have adequate time for their already bulging caseloads.

What happens after the "we can't do it" testimony is in, is not easily predicted. However, the point to be made here is that the occasion for the drafting and debating of the Code should also prove to be the occasion for prying open the conceptual and pragmatic issues that confound corrections. A joint effort by lawyers and persons expert in corrections to draft a Model Code already is overdue. The time to mobilize resources for the effort is now.

Once we are disabused of the notion that corrections is oriented toward correction and have accepted the fact that a benevolent purpose too often is a mask for arbitrary procedure, it is quite natural – at least for a lawyer – to argue for the traditional legal safeguards. Yet it must be conceded that some items in the due process grab-bag are relied on more as articles of faith than as documented solutions. Even so fundamental a requirement as the right to legal counsel – with its supposed assurances of legality, accuracy, propriety, and fairness in decision-making – is not an empirically validated solution for the abuses in corrections.

Desperately needed at this point — before we are too far down the road with a solution that does not work — are well-conceived studies and experiments. Such research might well parallel or even form a part of the effort to draft a Model Code. Continuing with the example of legal counsel, while recognizing that the entire field is virgin territory, we should know what impact, if any, counsel has had where he has represented parolees and prisoners. What techniques are used to provide counsel? What are the costs? What is the attitude of the clients and the decision-makers toward counsel? What strengths and weaknesses in his performance are attributable to which aspects of his legal education? If effective representation is the issue, and not legal counsel, then what alternatives are available?

For this task, the organized bar and legal educators should join forces with correctional administrators and begin the required research and experimentation. Foundations might well stimulate this effort and perhaps also pick up the tab for the Model Code.

Problems relating to education and training form a two-way street. Correctional personnel must know something about the law, and lawyers clearly need to know more about corrections. Law schools are beginning to introduce courses and seminars dealing with the correctional process. It is my impression that this is not matched in the professional or in-service training of correctional personnel.

Any person who is supervising individuals in the field, working in an institution, or otherwise making operational or policy decisions about offenders must have some understanding of the law. This refers not only to knowledge of the relevant statutes and leading decisions but to the concept of the rule of law in a democratic society — to the concepts addressed in this work. Having attempted to teach law to graduating seniors in a school of social work, I recognize both the problems and the potential. Effective instruction can bring home not only the values inherent in law and legal process but also implant a respect for facts, a distrust for conclusions too-easily arrived at, a grasp of analogical relevance, and the merits of an inductive approach.

Concomitant with the need to reflect law in education and training is the need to disseminate information concerning legal developments that are relevant to corrections. There is little to be gained simply by sending out terse summaries of new legislation or court decisions. Correctional personnel at all levels would seem to need, in addition, interpretive comments and suggestions about how to anticipate change and work within any new rules.

There can be no pretense that the suggestions in this chapter are complete or that, if implemented, they would prove workable. They are, however, reasonably related to the specific problems dealt with in the main body of this work and appear to be well within the reach of existing resources. The question now is: Are we willing to take the required action?

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